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ARTICLES

Freeing Prisoners' Labor

Stephen P. Garvey*

Although labor was central to the internal life of the early penitentiary, it has virtually vanished from today's prison. In this article, Professor Garvey proposes making labor once again a key part of the prison regime. During the decades surrounding the turn of the century, organized labor and business successfully lobbied for protectionist state and federal legislation that prohibited private firms from contracting for prison labor and selling prison-made goods on the open market. This legislation abolished the old "contract" system of prison labor and replaced it with the "state-use" system. Under the state-use system, inmates work only for the state, which also serves as the exclusive market for prison-made goods. This system continues to structure prison labor and results in widespread inmate idleness. Professor Garvey argues for a return to the contract system of prison labor, which would allow private firms to contract for inmate labor at whatever price the market will bear and to sell prison-made goods on the open market.

Labor gives to the solitary cell an interest; it fatigues the body and relieves the soul.

—Gustave de Beaumont and Alexis de Tocqueville¹

INTRODUCTION

When Gustave de Beaumont and Alexis de Tocqueville's 1831 pilgrimage to the United States took them inside its fledgling penitentiaries, they observed:

With daybreak, a bell gives the sign of rising; the jailors open the doors. The prisoners range themselves in a line, under the command of their respective

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1. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 57 (Herman R. Lantz ed. & Francis Lieber trans., S. Ill. Univ. Press 1964) (1833).

jailors, and go first into the yard, where they wash their hands and faces, and from thence into the workshops, where they go directly to work.²

Over a century and a half later, noted American criminologist Norval Morris asked prisoner #12345, Simon "Sam" Gutierrez, to describe what a typical day was like inside Illinois' maximum-security prison at Stateville.³ Gutierrez closed his account by noting: "[What my] letter misses [is] the relentless, slow-moving routine, the dull repetitiveness . . . of living this way. . . . [I]n prisons like Stateville, purposes are unclear, education is largely a token, idleness takes the place of work and industry"⁴

These two quotes highlight the dramatic transformation in the role of labor within the prison over the past two hundred years. Once a central element in the life of the penitentiary, labor has all but disappeared from today's prison.⁵ At one time superintendents of labor and industry, prison officials today are more like peacekeepers in a hostile land. Once busy working, prison inmates today sit idle. By almost all accounts, the modern penitentiary is an ominous and forbidding place where violence exists side by side with enervating tedium.⁶ As Morris puts it, most prisons today are places of

2. *Id.* at 65.

3. See Norval Morris, *The Contemporary Prison: 1965-Present*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 227, 228 (Norval Morris & David J. Rothman eds., 1995). Stateville Prison was the subject of James Jacobs' classic sociological study of the modern prison. See JAMES B. JACOBS, *STATEVILLE: THE PENITENTIARY IN MASS SOCIETY* (1977).

4. Morris, *supra* note 3, at 236.

5. See notes 229-267 *infra* and accompanying text.

6. Although reported incidents of prison violence appear to have remained relatively stable in recent years, see, e.g., Jamie Lillis, *Prison Escapes and Violence Remain Down*, *CORRECTIONS COMPENDIUM*, June 1994, at 6, 7, 14-15 & tbl.4, 16-17 & tbl.5 (collecting data on reported prison violence in fiscal years 1992 and 1993), violence in prison remains a substantial problem. See, e.g., *PRISON VIOLENCE IN AMERICA* (Michael C. Braswell, Reid H. Montgomery, Jr. & Lucien X. Lombardo eds., 2d ed. 1994) (collecting a series of studies which document the problem of prison violence); Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 *STAN. L. REV.* 1149, 1162 (1990) (detailing risks to inmates housed in the main prison for the District of Columbia).

Inmate-on-inmate violence is commonly sexual. See Cindy Struckman-Johnson, David Struckman-Johnson, Lila Rucker, Kurt Bumby & Stephen Donaldson, *Sexual Coercion Reported by Men and Women in Prison*, 33 *J. SEX RES.* 67, 74 (1996) (finding that 20% of inmates in a Midwestern state prison system "reported the experience of being pressured or forced into sexual contact"). But see Christine A. Saum, Hilary L. Surratt, James A. Inciardi & Rachael E. Bennett, *Sex in Prison: Exploring the Myths and Realities*, 75 *PRISON J.* 413, 427 (1995) (concluding, based on a survey of inmates in medium-security Delaware prison, that sexual assault occurs, but that the "preponderance of the activity is consensual sex rather than rape"). Prison violence is also commonly associated with gang activity. See Geoffrey Hunt, Stephanie Riegel, Tomas Morales & Dan Waldorf, *Changes in Prison Culture: Prison Gangs and the Case of the "Pepsi Generation"*, 40 *SOC. PROBS.* 398, 407 (1993) (reviewing recent changes in the culture of California prison gangs and concluding that "[l]ife in prison is no longer organized but instead is viewed as both capricious and dangerous").

"grindingly dull routine interrupted by occasional flashes of violence and brutality."⁷

The architects of the penitentiary had hoped for better. According to French historian and philosopher Michel Foucault, the rise of the penitentiary switched the site of punishment from the body to the soul.⁸ In fact, the body continued to define punishment in the early penitentiary, only it was not the body in pain, but the body at work.⁹ Idealistically conceived as a "laboratory of virtue,"¹⁰ the early penitentiary was founded on the hope of moral reform, which was in turn based in large part on the redeeming power of hard labor. In contrast, today's prison is more often characterized as a "seminary of vice" or "criminal university," where moral decay is more likely than moral reform and where hard labor has transmogrified into hard time.¹¹

The dominant images of prison labor today depict inmates working on chain gangs, which have once again begun to appear on southern and western roads,¹² or dutifully stamping license plates in prison workshops.¹³ These images may arouse different reactions, but both are the product of a common history. Moreover, both portray the inmate laboring for the benefit of the state, which is the sole employer and beneficiary of his labor.

Things were not always this way. In fact, at one time, prisoners worked for private firms and the goods they produced were offered for sale on the open market for all to buy.¹⁴ The chain gang and the license plate thus reflect a dramatic transformation of the structure of prison labor, from free

7. Morris, *supra* note 3, at 227. As Morris notes, however, "prisons" come in many different varieties, ranging from "open prisons" that are "indistinguishable from farms" to maximum-security prisons like Stateville. *Id.* at 227-28.

8. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 16 (Alan Sheridan trans., Pantheon Books 1977) (1975) ("The expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations.").

9. Foucault obviously recognized this transformation. See *id.* at 11 (commenting that the body is still the "instrument or intermediary" for reaching the soul).

10. See generally MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760-1835* (1996) (analyzing the emergence of the penitentiary in Philadelphia); see also Martha Grace Duncan, "Cradled on the Sea": *Positive Images of Prison and Theories of Punishment*, 76 CAL. L. REV. 1201, 1243-46 (1988) (collecting various "positive images" used to describe the prison).

11. The claim that prison life "breed[s] or deepen[s] criminality and antisociality" is commonly referred to as the "prisonization" thesis. See DONALD CLEMMER, *THE PRISON COMMUNITY* 300 (2d ed. 1958). For a review of the literature critiquing overly simple versions of the prisonization thesis, see GORDON HAWKINS, *THE PRISON: POLICY AND PRACTICE* 63-71 (1976). See also RICHARD A. WRIGHT, *IN DEFENSE OF PRISONS* 163 (Greenwood Press Contributions in Criminology and Penology Series No. 43, 1994) (concluding that "little empirical evidence" supports the "prisonization" thesis).

12. See notes 346-347 *infra* and accompanying text.

13. Cf. Warren Cohen, *Need Work? Go to Jail*, U.S. NEWS & WORLD REP., Dec. 9, 1996, at 66 (noting prison "inmates' well-known dominance of license plate production").

14. See notes 77-81 & 97-109 *infra* and accompanying texts.

market to state monopoly. This transformation lies behind the modern prison's infrastructure of idleness.

I propose that we reopen the market for prison goods and labor. Private firms should be allowed to contract for prison labor and to sell the products of that labor on the open market. Today they can do neither.¹⁵ My proposal unfolds in three parts.

Part I gives a condensed overview of the history of prison labor. It describes the role of labor in the theory and practice of the early penitentiary in order to recover a sense of how central labor once was to the penitentiary's internal life and cadence. It then examines the forces that eventually closed the market for prison goods and labor in the waning decades of the nineteenth century and the opening decades of the twentieth. As we will see, the demise of prison labor had more to do with politics than it did with humanitarianism. Prison labor disappeared primarily because organized labor unions and business organizations wanted to eliminate the competition.

Part II examines the state of prison labor today. Little has changed. The embargo imposed on prison-made goods in the decades surrounding the turn of the century persists to this day. So too does the idleness it invariably engenders.

Part III moves from historical to normative analysis. After briefly describing how an open market for prison goods and labor might be structured, it discusses the potential benefits and the risks of lifting the embargo. The normative issues are complex and their resolution controversial. In the end, however, the benefits of reopening the market for prison goods and labor are sufficiently attractive that the burden of proof should shift to those who wish to maintain the status quo and keep the market closed. Part III ends with a turn from normative analysis to positive speculation and examines three ways of freeing prisoners' labor and allowing the sale of prison-made goods on the open market.

I. CLOSING THE MARKET

The history of the prison is in large measure a history of prison labor. This part recounts that history. After describing the different ways in which prison labor has historically been organized, this part explains how and why labor lost the central place it once held within the penitentiary.¹⁶ The story of this loss is mainly one of interest-group politics.

15. See notes 208-215 *infra* and accompanying text (discussing the impact of the Hawes-Cooper and Ashurst-Sumners Acts). But see notes 245-250 *infra* and accompanying text (describing how private industry can employ prison labor under the Prison Industry Enhancement Act).

16. The focus here is on the role of prison labor within the prison regime, not on the origins of the penitentiary. Of course, some analyses of the prison's origins, especially those within the Marxist tradition, find a close connection between prison labor and the emergence of the peniten-

A. *Organizational Forms of Prison Labor*

Prison labor has been organized in different ways at different times.¹⁷ In general, prison labor can be organized in three different ways. The dimensions that distinguish one organizational form from another are (1) the locus of control over the production process (state control or private control)¹⁸ and

tiary. For example, one argument within this tradition holds that the penitentiary supported the development of capitalism by absorbing surplus labor from the labor market and by instilling industrial discipline among rebellious members of the working class. For examples of Marxist-inspired analyses of the prison, see generally DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* (Glynis Cousin trans., 1981) (1977); GEORGE RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* (Russell & Russell 1968) (1939); Christopher Adamson, *Toward a Marxian Penology: Captive Criminal Populations As Economic Threats and Resources*, 31 SOC. PROBS. 435 (1984); Theodore G. Chiricos & Miriam A. Delone, *Labor Surplus and Punishment: A Review and Assessment of Theory and Evidence*, 39 SOC. PROBS. 421 (1992); Russell P. Dobash, *Labour and Discipline in Scottish and English Prisons: Moral Correction, Punishment and Useful Toil*, 17 SOC. 1 (1983); and Rosalind P. Petchesky, *At Hard Labor: Penal Confinement and Production in Nineteenth-Century America*, in *CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY* 595 (David F. Greenberg ed., 1993) (1981).

For the principal historical accounts analyzing the emergence of the penitentiary, see generally FOUCAULT, *supra* note 8; ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* (1992); MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850* (1978); DAVID J. ROTHMAN, *DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (rev. ed. 1990); PIETER SPIERENBURG, *THE PRISON EXPERIENCE: DISCIPLINARY INSTITUTIONS AND THEIR INMATES IN EARLY MODERN EUROPE* (1991); and John H. Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 J. LEGAL STUD. 35 (1976). See also THOMAS L. DUMM, *DEMOCRACY AND PUNISHMENT: DISCIPLINARY ORIGINS OF THE UNITED STATES* (1987) (developing a Foucaultian interpretation of the "disciplinary origins" of the prison in the United States); George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235 (1995) (suggesting that earliest penitentiaries represented community efforts to save wayward youths); Michael Ignatieff, *State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment*, in 3 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 153 (Michael Tonry & Norval Morris eds., 1981) (reviewing three revisionist accounts of the history of the penitentiary); Robert P. Weiss, *Humanitarianism, Labour Exploitation, or Social Control? A Critical Survey of Theory and Research on the Origin and Development of Prisons*, 12 J. SOC. HIST. 331 (1987) (reviewing the debate on the development of the penitentiary).

The role of labor inside the prison should also be distinguished from "work-release" programs in which inmates are employed outside the prison. See Greg Wees, *Work and Educational Release 1996: Programs Are Numerous, but Participation Rates Remain Low*, CORRECTIONS COMPENDIUM, May 1997, at 8, 8 (noting that only 1.8% of all state and federal prisoners currently participate in a work-release program).

17. See, e.g., GAIL S. FUNKE, BILLY L. WAYSON & NEAL MILLER, *ASSETS AND LIABILITIES OF CORRECTIONAL INDUSTRIES* 9-13 (1982) (describing systems of prison labor); Henry Calvin Mohler, *Convict Labor Policies*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 530, 548-53 (1925) (same).

18. Another variation along this dimension would place inmates themselves in charge of the production process. See, e.g., Sharon Goodman, Note, *Prisoners As Entrepreneurs: Developing a Model for Prisoner-Run Industry*, 62 B.U. L. REV. 1163, 1177-79 (1982) (describing a computer programming company run entirely by prisoners at a Massachusetts minimum security prison); John James Washburn, Note, *Businesses Behind Bars: The Case for Prisoner Entrepreneurship*, 13 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 117, 134 (1987) (describing a nonprofit company in

(2) the market within which prison-made goods can be sold (state market or open market). The table below depicts these two dimensions. Another important dimension (not separately shown) involves the locus of responsibility for inmate custody, care, and discipline (state control or private control).

ORGANIZATIONAL FORMS OF PRISON LABOR

		Locus of Control over Production	
		<i>Private Control</i>	<i>State Control</i>
Market for Prison Goods	<i>State Market</i>	Ø	State-Use
	<i>Open Market</i>	Contract Lease	State-Account

First, under the “state-account” or “public-account” system, one of the earliest ways of organizing prison labor, the state maintains control over the production process, and prison-made goods are sold on the open market.¹⁹ The state is also responsible for inmate custody, care, and discipline.²⁰

Second, under the “state-use” system, the prevailing system today, the state is responsible for overseeing the production process, and the sale of prison-made goods is limited to state markets (e.g., state agencies, institutions, and political subdivisions).²¹ The “public-works” system, in which prisoners work on public projects, is a variant of the state-use system.²²

Third, under the “contract” system, the state sells the labor of its prisoners to private firms.²³ The contracting firms oversee production, supply the required raw materials, and sell the inmate-produced goods on the open mar-

which prisoners occasionally occupied management positions); Edgar May, *Maine: Was Inmate Capitalism out of Control?*, CORRECTIONS MAG., Feb. 1981, at 17, 18-23 (discussing the initial economic success and later curtailment of the prisoner-run crafts industry at a Maine state prison).

19. See Mohler, *supra* note 17, at 548.

20. See *id.*

21. See *id.* at 552-53.

22. See *id.* at 553. The chain gang is one example of the public-works system.

23. See *id.* at 549-50.

ket.²⁴ However, responsibility for inmate custody, care, and discipline typically remains with the state.²⁵

The "lease" system resembles the contract system. As in the contract system, production rests in private hands, and prison-made goods are sold on the open market. The difference is that the lease system, unlike the contract system, vests responsibility not only for the production process but also for inmate custody, care, and discipline in the hands of private firms. The state has no role.²⁶

As the following sections explain, prison labor in the United States initially operated under the state-account system, but this system quickly gave way to the contract and lease systems, which in turn were eventually displaced by the state-use system.

B. *The Rise of Prison Labor, 1790-1870*

The earliest ancestor of the modern-day prison was an English institution known as the "bridewell," or "house of correction."²⁷ Unlike the old English gaol, the bridewell was not merely a place of confinement. It was instead an intermediate punishment for the "sturdy and idle" vagabond guilty of "petty delinquencies."²⁸ Designed to serve the dual purposes of punishment and

24. *See id.* A hybrid of the contract and state-account systems is the "piece-price" system. Under this system, the state oversees production, while private firms supply the necessary raw materials. The firm pays an agreed-upon price for each completed item a prisoner produces, rather than paying a set sum for the inmate's labor itself. The finished goods are sold on the open market. Prisoners commonly receive a small sum for each item they produce above a daily quota. *See id.* at 551.

25. *See id.* at 549.

26. *See id.* at 551-52. Asking whether prisoners should work and under what circumstances is different from asking whether prisons themselves should be "privatized." Privatization entails a transfer of control over the day-to-day operations of the prison, including inmate custody and discipline, from public authorities to private firms. For a discussion of how privatization may or may not change the way prison labor is organized, see IRA P. ROBBINS, *THE LEGAL DIMENSIONS OF PRIVATE INCARCERATION* 2-7 (1988). For a comprehensive overview of the issues surrounding the privatization debate, see generally DAVID SHICHOR, *PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS* (1995). Despite the intense debate surrounding privatization, inmates in private facilities still represent only 2.5% of the total federal and state prison and jail population. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1995, at 96 tbl.1.96, 548 tbl.6.11 (1996) [hereinafter 1995 SOURCEBOOK].

27. *See* Joanna Innes, *Prisons for the Poor: English Bridewells, 1555-1800*, in *LABOUR, LAW, AND CRIME: AN HISTORICAL PERSPECTIVE* 42, 42-43 (Francis Snyder & Douglas Hay eds., 1987). The first such institution was established in London on the site of the abandoned Palace of Bridewell. *See id.* at 52. A similar institution opened in Amsterdam in 1596. *See* SPIERENBURG, *supra* note 16, at 41. It was officially known as the *tuchthuis*—"the word *tucht* . . . connoted coaching into better habits"—but was popularly known as the *rasphuis*, because its main form of labor was rasping wood. *See id.* at 43, 52. *See generally* THORSTEN SELLIN, *PIONEERING IN PENOLOGY: THE AMSTERDAM HOUSES OF CORRECTION IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* (1944) [hereinafter SELLIN, *PIONEERING IN PENOLOGY*].

For an account of penal labor in still earlier eras, see J. THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* (1976) [hereinafter SELLIN, *SLAVERY*].

28. Innes, *supra* note 27, at 52.

reformation, the bridewell was charged with the mission of draining the "filthy puddle of idleness."²⁹ Moreover, it was to accomplish this mission through the discipline of hard labor.³⁰

The early American colonies relied mainly on fines, the scaffold, and the pillory for punishment.³¹ Like their English counterparts, colonial gaols had modest goals. They held detainees until they were tried, debtors until they paid, and convicts until they were punished, which generally meant being whipped, branded, pilloried, or executed.³² The gaols "were dirty, undisciplined, unisex warehouses in which every form and shape of humanity was shoved in, helter-skelter."³³

Toward the end of the eighteenth century, a new institution—the penitentiary—emerged and began to displace the older ways. Like the bridewell, this new institution aimed at the reformation of petty offenders, but the penitentiary extended its reach to include more serious offenders as well as

29. *Id.* at 55; cf. SPIERENBURG, *supra* note 16, at 12 ("The key word is idleness. The desire to adopt a more active policy toward people who failed to perform their daily tasks along expected lines was a major motivation behind the establishment of carceral institutions.").

30. See Innes, *supra* note 27, at 52 ("[T]he greater the rogue, the more arduous the labour he might be set."). Throughout eighteenth-century England, the bridewells existed alongside corporal and capital punishments and, beginning systematically in 1718, transportation to the American colonies. See J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800*, at 450-519 (1986). The start of the American Revolution brought transportation to an abrupt end. As a result, English convicts were temporarily confined on hulks (ships) moored in the Thames River. When the hulks were unable to accommodate all the prisoners, the ensuing crisis produced a great debate within England between those who championed the penitentiary and those who preferred transportation to Botony Bay in Australia's New South Wales. See *id.* at 560-601. It was in the context of this debate that Bentham defended his famed panopticon prison. See Jeremy Bentham, *Panopticon Versus New South Wales* (1821), in 4 *THE WORKS OF JEREMY BENTHAM* 173 (John Bowring ed., London, Simpkin, Marshall, & Co. 1843); see also JANET SEMPLE, *BENTHAM'S PRISON: A STUDY OF THE PANOPTICON PENITENTIARY* 95-110 (1993) (describing the political situation in which Bentham propounded his panopticon). For Bentham's vision of the design and operation of the panopticon, see Jeremy Bentham, *Panopticon; or The Inspection-House* (1791), in 4 *THE WORKS OF JEREMY BENTHAM*, *supra*, at 37 [hereinafter Bentham, *Panopticon*]. For analyses of the panopticon, see SEMPLE, *supra*, at 111-65, and Miran Božovič, *Introduction to JEREMY BENTHAM, THE PANOPTICON WRITINGS* 1, 2-27 (Miran Božovič ed., 1995).

31. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 37-44 (1993). English convicts were also transported to the colonies and sold into servitude. See, e.g., A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775*, at 1 (1987) ("As early as 1597, Parliament gave magistrates the power to exile rogues and vagabonds 'beyond the seas' . . ."); DAVID W. GALENSON, *WHITE SERVITUDE IN COLONIAL AMERICA: AN ECONOMIC ANALYSIS* 232 n.38, 272 n.51 (1981) (stating that transported convicts from England provided inexpensive indentured labor in eighteenth-century America); ABBOT EMERSON SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776*, at 110-33 (describing the transportation of English convicts to America for servitude) (1947). In time, however, the house of correction and the workhouse superseded the practice of indenture. See E.T. Hiller, *Development of the Systems of Control of Convict Labor in the United States*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 241, 243-44 (1914).

32. See FRIEDMAN, *supra* note 31, at 77.

33. *Id.*

petty delinquents.³⁴ Labor continued to be a common and central feature of this enlarged aspiration, but the specific way in which states chose to organize prison labor soon divided along geographic lines. North and South followed separate and distinct paths.

1. *Prison labor in the North.*

The institution we know as the penitentiary began in Philadelphia and eventually spread throughout colonial and post-revolutionary America. Where it went, so too did penal labor.

Labor in the "Cradle of the Penitentiary." William Penn's 1682 *Frame of Government*³⁵ declared that "all prisons shall be work-houses, for felons, vagrants, and loose and idle persons; whereof one shall be in every county."³⁶ Nearly a century later, Pennsylvania's 1776 Constitution declared that "houses ought to be provided for punishing by hard labour"³⁷ in order "to make sanguinary punishments"—e.g., death, mutilation, and branding—"less necessary."³⁸ Unlike corporal punishments, labor worked on the body over time. Its proponents hoped the discipline of labor "would lead to reformation . . . [and] the rebirth of character."³⁹ Moreover, penal labor was to be "publicly and disgracefully imposed."⁴⁰ Inmates in Philadelphia, for example, worked on the open streets.⁴¹

34. See, e.g., HIRSCH, *supra* note 16, at 23 ("[T]he postrevolutionary initiatives for criminal incarceration in America owed their inspiration primarily to the rehabilitative tradition of the ancient workhouse.").

35. WILLIAM PENN, *FRAME OF GOVERNMENT OF PENNSYLVANIA—1682 (1682)*, reprinted in 5 *FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, OR COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 3052 (Francis Newton Thorpe ed., 1909).

36. *Id.* at 3061. Penn's plan to turn prisons into workhouses "never received any systematic execution." HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY* 163 (Patterson Smith 1968) (1927). Penn's Code itself was replaced in 1718 by the Hempstead or Duke of York's laws. See *id.* at 28.

37. PA. CONST. of 1776, art. I, § 39, reprinted in 5 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 35, at 3090. The constitution further specified that "criminals shall be employed for the benefit of the public, or for reparation of injuries done to private persons." *Id.*

38. *Id.*

39. MERANZE, *supra* note 10, at 55.

40. NEGLEY K. TEETERS & JOHN D. SHEARER, *THE PRISON AT PHILADELPHIA: CHERRY HILL: THE SEPARATE SYSTEM OF PENAL DISCIPLINE, 1829-1913*, at 6 (1957) (citing PENN. MERCURY, Sept. 8, 1786, at 2).

41. The Pennsylvania experiment in public penal labor even attracted the attention of Thomas Jefferson. In his revised code for Virginia, Jefferson designated all property offenses, as well as manslaughter, "[c]rimes punishable by LABOR." THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 139 (Harper Torchbooks 1964) (1861). A burglar, for example, would receive four years labor "for the public," combined with double reparation. See *id.* Ultimately, however, the Pennsylvania experiment failed, and Jefferson rejected the idea. See PAUL W. KEVE, *THE HISTORY OF CORRECTIONS IN VIRGINIA* 15 (1986).

But Pennsylvania's system of public labor did not work as planned. The prisoners, known as "wheelbarrow men,"⁴² sometimes fought with their keepers and occasionally escaped. Crowds gathered around the prisoners while they worked, taunting them or giving them alms.⁴³ In response, lawmakers removed the inmates from the streets and decided that they should instead labor behind prison walls.⁴⁴

Opened in 1790, Philadelphia's renovated Walnut Street Jail was the site of the new nation's first true penitentiary.⁴⁵ With the endorsement of the indefatigable Dr. Benjamin Rush, a leading citizen and a signer of the Declaration of Independence, silence and labor would be the twin engines of moral reform inside this latest innovation.⁴⁶ Silence enlisted the prisoner's own conscience to provide his punishment.⁴⁷ Meanwhile, labor attacked idleness, which many reformers saw as the principal cause of crime.⁴⁸ "If solitude deployed the conscience to break the inmates down, constant labor would discipline the body, teach new habits, and lead to a recovery of lost virtue."⁴⁹ Accordingly, lawmakers decided that life inside the Walnut Street Jail should include labor "of the hardest and most servile kind."⁵⁰

42. TEETERS & SHEARER, *supra* note 40, at 6.

43. See MERANZE, *supra* note 10, at 87; see also TEETERS & SHEARER, *supra* note 40, at 6 ("The sport of the idle and the vicious, [the wheelbarrow men] often became incensed, and naturally took violent revenge upon the aggressors." (quoting ROBERTS VAUX, NOTICES OF THE ORIGINAL AND SUCCESSIVE EFFORTS TO IMPROVE THE DISCIPLINE OF THE PRISON AT PHILADELPHIA, AND TO REFORM THE CRIMINAL CODE OF PENNSYLVANIA: WITH A FEW OBSERVATIONS ON THE PENITENTIARY SYSTEM 21 (1826))).

44. See MERANZE, *supra* note 10, at 167.

45. See TEETERS & SHEARER, *supra* note 40, at 10. Although Philadelphia's Walnut Street Jail is generally considered the "cradle of the penitentiary," see NEGLEY K. TEETERS, THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA, 1773-1835 (1955), earlier colonial prisons were established in Connecticut (Newgate, 1773), see FRIEDMAN, *supra* note 31, at 78, and Massachusetts (Castle Island, 1785), see Alexis M. Durham III, *Newgate of Connecticut: Origins and Early Days of an Early American Prison*, 6 JUST. Q. 89, 90 (1989). New York's first prison (Newgate, 1797) was built a few years after the Walnut Street Jail. See W. DAVID LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848, at 29-30 (1965). For a historical survey of prisons in the United States from the late 1700s to the late 1960s, see BLAKE MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS (1977).

46. See TEETERS, *supra* note 45, at 30; see also TEETERS & SHEARER, *supra* note 40, at 9, 10 (noting prison reformers' plan to rehabilitate inmates using solitude and labor). For a Marxist analysis of the creation of the Walnut Street Jail, see Paul Takagi, *The Walnut Street Jail: A Penal Reform to Centralize the Powers of the State*, in CRIME AND CAPITALISM, *supra* note 16, at 533-43.

Labor was an integral part of the internal regimes of other early American prisons. See, e.g., HARRY ELMER BARNES, A HISTORY OF THE PENAL, REFORMATORY AND CORRECTIONAL INSTITUTIONS OF THE STATE OF NEW JERSEY 59-60 (1918) (New Jersey); HIRSCH, *supra* note 16, at 23-25 (Massachusetts); KEVE, *supra* note 41, at 28-29 (Virginia); LEWIS, *supra* note 45, at 32-33, 39-41 (New York); Durham, *supra* note 45, at 95-96, 100-03 (Connecticut).

47. See MERANZE, *supra* note 10, at 168.

48. See *id.* at 169.

49. *Id.*; see also *id.* at 187 (noting that labor was the "ultimate element in the reshaping of bodily disposition").

50. BARNES, *supra* note 36, at 164. The "hardest and most servile" requirement was aban-

The Walnut Street Jail operated on a hybrid of the state-account and contract systems known as the piece-price system.⁵¹ While the state supervised the production process, private contractors typically supplied raw materials and purchased the finished product, which they resold on the open market.⁵²

Whatever its effect on the human soul, the Walnut Street Jail was an economic disappointment. It was rarely, if ever, profitable.⁵³ In time, the jail became overcrowded, and its system of production began to break down.⁵⁴ By the early 1800s, most inmates at Walnut Street were idle.⁵⁵ The state legislature's decision to authorize the installation of a treadmill in 1823 signaled the system's collapse.⁵⁶

Labor in the Auburn-Cherry Hill rivalry. Despite the disappointing results at Walnut Street, the ideal of the penitentiary and of moral reform through the regime it prescribed survived, as did the belief in the twin pillars of silence and labor. Indeed, the Jacksonian period—the “golden age” of the American penitentiary—witnessed a celebrated and intense rivalry between New York and Pennsylvania over the correct mix between silence and labor. Each state competed to have its blueprint declared best at bringing about moral reform. Each side also thought its new penitentiary would be a source of profit as well.⁵⁷

In Pennsylvania, silence predominated over labor as the central element in the penitentiary's internal regime.⁵⁸ The Eastern State Penitentiary (also known as the “Cherry Hill” Prison, so christened for its nearby cherry orchard) opened in Philadelphia in 1829, replacing the Walnut Street Jail and inaugurating the Pennsylvania “separate” (or “solitary”) system.⁵⁹ Inmates

done in 1795. *See id.* at 165.

51. *See* note 24 *supra*.

52. *See* BARNES, *supra* note 36, at 165; TEETERS & SHEARER, *supra* note 40, at 142.

53. *See* BARNES, *supra* note 36, at 166.

54. *See id.*

55. *See id.* at 167-68 (observing that one-tenth of the prison population at most was employed during the 1820s).

56. *See id.* at 166 (describing the introduction of the treadmill as “that final confession of both intellectual and industrial bankruptcy in penal administration”).

The treadmill was “a large hollow cylinder of wood on an iron frame, round the circumference of which were a series of steps” on which the inmate was forced to walk. ERNEST W. PETTIFER, PUNISHMENTS OF FORMER DAYS 168 (1974). *See generally* David H. Shayt, *Stairway to Redemption: America's Encounter with the British Prison Treadmill*, 30 TECH. & CULTURE 908 (1989) (describing the introduction of the treadmill in the United States).

57. *See* LEWIS, *supra* note 45, at 99-100 (discussing an attempt to make Auburn's labor system self-sustaining); TEETERS & SHEARER, *supra* note 40, at 142 (noting that inmate production was intended to defray the costs of incarceration at Cherry Hill).

58. *See* MERANZE, *supra* note 10, at 217. Indeed, those responsible for creating the Pennsylvania system initially disagreed on whether it would include any kind of labor. *See* BARNES, *supra* note 36, at 222; TEETERS & SHEARER, *supra* note 40, at 23-32.

59. *See* TEETERS & SHEARER, *supra* note 40, at 3 (noting that Cherry Hill was founded “on

were kept confined in their separate cells and silence was strictly enforced. Penologists of the time believed that criminality was contagious, and silence was meant to keep it from spreading.⁶⁰ Life inside Cherry Hill was eerily quiet. Although inmates worked, they did so alone, silently in their separate cells.⁶¹ Labor kept the inmates busy and “‘evil’ thoughts and reflections”⁶² at bay. It also taught them a trade in preparation for a “self-supporting economic existence upon obtaining freedom.”⁶³ The prison’s production was organized on the state-account system, and the inmates’ work consisted mainly of handicrafts.⁶⁴

Production at Auburn Prison, built in upstate New York in 1816, was also organized on the state-account system.⁶⁵ Life inside Auburn, like Cherry Hill, was based on silence and labor, but Auburn replaced Cherry Hill’s “separate” system with the “congregate” (or “silent”) system.⁶⁶ Under this system, inmates worked and took meals together. They were separated only at night.⁶⁷ Nonetheless, they were still required to remain silent at all times. Although the differences between the New York and Pennsylvania systems may seem trivial from today’s vantage point, their rivalry at the time was intense, reflecting the zeal and sense of mission felt on both sides.⁶⁸

In the end, the Auburn system prevailed.⁶⁹ Although it probably produced no better men than its Pennsylvania rival—if either succeeded in producing better men—it did capture a larger share of the domestic market for

the principle of separate, or solitary, confinement”).

60. *See id.* at 4.

61. *See id.* at 23. Solitary confinement also led to charges that it caused insanity. *See id.* at 209-10. For a historical overview of solitary confinement, see Herman Franke, *The Rise and Decline of Solitary Confinement: Socio-historical Explanations of Long-term Penal Changes*, 32 *BRIT. J. CRIMINOLOGY* 125 (1992).

62. BARNES, *supra* note 36, at 222; *see also* John H. Cary, *France Looks to Pennsylvania: The Eastern Penitentiary As a Symbol of Reform*, 82 *PA. MAG. HIST. & BIOGRAPHY*, Apr. 1958, at 186, 192 reprinted in *POLICE, PRISON, AND PUNISHMENT: MAJOR HISTORICAL INTERPRETATIONS* 96, 102 (Kermit L. Hall ed., 1987) (noting that solitude was meant to permit inmates to “gain[] an ‘inner light’—one of the central tenets of Quaker theology—to correct their evil dispositions”).

63. BARNES, *supra* note 36, at 222.

64. *See* TEETERS & SHEARER, *supra* note 40, at 142-43. Cherry Hill’s hand-craft system of production continued until 1918, when power-driven machinery was finally introduced. *See* BARNES, *supra* note 36, at 230.

65. *See* GLEN A. GILDEMEISTER, *PRISON LABOR AND CONVICT COMPETITION WITH FREE WORKERS IN INDUSTRIALIZING AMERICA, 1840-1890*, at 9 (1987).

66. *See* TEETERS & SHEARER, *supra* note 40, at 3-4.

67. *See* Mohler, *supra* note 17, at 556-57; *see also* LEWIS, *supra* note 45, at 111-35 (describing life inside the Auburn prison).

68. *See* BARNES, *supra* note 36, at 176-80 (discussing the conflict between the Auburn and Pennsylvania systems); TEETERS & SHEARER, *supra* note 40, at 4 (noting that the prison systems “competed for recognition throughout the nineteenth century”).

69. *See* Mohler, *supra* note 17, at 557-58 (discussing reasons for the widespread adoption of the Auburn system).

prisons. Offspring of the Auburn model appeared throughout the North as more and more states followed New York's lead.⁷⁰

The secret of Auburn's success was mainly economic. For one thing, prisons like Auburn were cheaper to build. An Auburn cell cost \$584, compared to \$1023 for a cell at Cherry Hill.⁷¹ Moreover, allowing inmates to work as a group proved to be the more efficient way to organize their labor.⁷² Placed on the defensive, keepers at Cherry Hill were quick to emphasize labor's reformatory power and downplay its profit-making potential.⁷³

Despite their differences, the Cherry Hill and Auburn systems shared two central features. First, both sought to achieve reform through silence and labor. However "harsh and bizarre"⁷⁴ their internal routines may now seem—and their disciplinary practices were indeed harsh—the professed intent of their creators was benevolent.⁷⁵ The architects of the penitentiary hoped and believed that its regime of silence and labor would create a world from which the momentarily fallen would emerge as worthy citizens of the republic. Second, both relied on the state-account system as the way of organizing prison labor. Prison authorities supervised and managed the pro-

70. Although several states experimented with the separate system, most eventually abandoned it in favor of the Auburn model, see TEETERS & SHEARER, *supra* note 40, at 201-02, which ultimately prevailed even at Cherry Hill, see *id.* at 221. The Cherry Hill model was more successful in Europe. See Cary, *supra* note 62, at 110 ("England in 1835, Belgium in 1838, Sweden in 1840, and Denmark in 1846, all adopted solitary discipline in whole or in part."). European nations may have preferred the Pennsylvania system because they believed it relied less heavily on corporal punishment than did the Auburn system. See MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA 36 (1984).

71. See Martin B. Miller, *At Hard Labor: Rediscovering the 19th Century Prison*, 9 ISSUES CRIMINOLOGY 91, 97-98 (1974), reprinted in POLICE, PRISON, AND PUNISHMENT: MAJOR HISTORICAL INTERPRETATIONS, *supra* note 62, at 495, 501-02.

72. Cf. LEWIS, *supra* note 45, at 178 (noting state legislators' preoccupation with output and revenue).

73. See BARNES, *supra* note 36, at 223; TEETERS & SHEARER, *supra* note 40, at 144-45.

74. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 13 (1981).

75. However benign the intent of their creators and administrators, the new penitentiaries relied heavily on corporal punishments to enforce discipline. Auburn used the whip, see GLENN, *supra* note 70, at 34-36, while Cherry Hill used the water shower and iron gag, see TEETERS & SHEARER, *supra* note 40, at 207; see also GERSHOM POWERS, A BRIEF ACCOUNT OF THE CONSTRUCTION, MANAGEMENT, & DISCIPLINE OF THE NEW YORK STATE PRISON AT AUBURN 60 (1826) ("[A]s a mode of punishment and as the means of enforcing discipline in this prison, stripes are generally resorted to . . ."); cf. CHARLES SUTTON, THE NEW YORK TOMBS: ITS SECRETS AND ITS MYSTERIES 591-96 (1874) (describing disciplinary techniques used at Sing Sing). Moreover, Cherry Hill's use of solitary confinement led quickly to charges that it induced insanity. See TEETERS & SHEARER, *supra* note 40, at 209-10. For example, Charles Dickens' visit to Cherry Hill prompted him to accuse the prison of "wear[ing] the mind into a morbid state." CHARLES DICKENS, AMERICAN NOTES AND PICTURES FROM ITALY 109 (Oxford Univ. Press 1957) (1842).

duction process and offered their inmates' goods for sale on the open market.⁷⁶

This system of prison labor soon changed. The states quickly realized that even penitentiaries built on the Auburn model would not be self-supporting.⁷⁷ Looking for relief from the mounting costs of their new institutions, they turned to the contract system, hoping that the privatization of production would put the penitentiary on a financially secure foundation.⁷⁸ Indeed, Massachusetts began contracting the labor of its inmates as early as 1807.⁷⁹ New York started selling its inmates' labor beginning in the 1820s.⁸⁰ Connecticut, Ohio, Indiana, and Illinois soon did likewise.⁸¹

By 1867, the contract system had become the dominant organizational form of prison labor throughout the North.⁸² Although prison authorities were still officially committed to the reforming power of labor, the search for profit was steadily becoming more important. For example, whenever a conflict arose between profit and reform, administrators at Auburn "generally placed emphasis at the point on which the interests of taxpayers, prison officers, and contractors converged, namely that of monetary return."⁸³

This shift in emphasis from moral reform to profit paralleled a deeper shift in the social meaning of work itself. The work ethic was a cultural creation of the first half of the nineteenth century rooted in an economic "setting of farmers, craftsmen, and merchants."⁸⁴ The settlers of Puritan New England and Quaker Pennsylvania "fashioned a land preoccupied with

76. See TEETERS & SHEARER, *supra* note 40, at 142-43; GILDEMEISTER, *supra* note 65, at 19. Auburn used the state-account system for only a short period of time. Prison labor at Auburn was organized under the contract system one year after the prison was completed. By that time, the state-account system used in Newgate, New York's earliest prison located in Greenwich Village, was no longer profitable. See *id.* at 9-10 (noting a shift from state-account to private contracting for prison labor); Alexis M. Durham III, *Managing the Costs of Modern Corrections: Implications of Nineteenth-Century Privatized Prison-Labor Programs*, 17 J. CRIM. JUST. 441, 444, 447 (1989) (suggesting that Newgate's failure prompted the change to the contract system).

77. See Mohler, *supra* note 17, at 557 (noting that "most" of the reasons for adopting the contract system "hinge[d] on the fact that the public account system proved economically unsatisfactory").

78. See Hiller, *supra* note 31, at 250-51.

79. See *id.* at 251.

80. See GILDEMEISTER, *supra* note 65, at 10 (dating the first Auburn contract to 1821); see also LEWIS, *supra* note 45, at 179 (stating that New York shifted from the state-account to the contract system in 1817); Hiller, *supra* note 31, at 251 (offering 1824 as the appropriate date).

81. See GILDEMEISTER, *supra* note 65, at 21-22; Hiller, *supra* note 31, at 251.

82. See Mohler, *supra* note 17, at 559 (stating that the contract system was widely used except in Maine, Wisconsin, certain southern states, and New York's Clinton Prison).

83. LEWIS, *supra* note 45, at 181; see also *id.* at 178 (noting an "intense preoccupation with financial considerations"); *id.* at 181-82 ("[R]ehabilitation was a mere by-product if it occurred at all.").

84. DANIEL T. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920*, at xii (1974).

toil”⁸⁵ in which “*laborare est orare*: work itself was prayer.”⁸⁶ With its “moral preoccupation with labor,”⁸⁷ the work ethic considered all work ennobling. Hard-working Americans held the idle—rich and poor alike—in contempt. By mid-century, however, the locus of production began to move from the home and workshop to the factory.⁸⁸ Removed from its natural habitat, the work ethic and the belief in the intrinsic dignity of all labor began to atrophy.⁸⁹ Work became more a source of profit and less of dignity, inside the prison and out.

2. *Prison labor in the South.*

The penitentiary was less prominent in the South than it was in the North. The “black flower of civilized society,” as Nathaniel Hawthorne once described it, “seemed to flourish only in the soil that produced cities and factories.”⁹⁰ Nonetheless, the South also built penitentiaries. Mississippi’s and Alabama’s penitentiaries, both known simply as the “Walls,”⁹¹ were built on the Auburn model in the early 1840s.⁹² Georgia’s first penitentiary opened in 1817 at Milledgeville.⁹³ Only in the Carolinas and Florida did the penitentiary fail to take root.⁹⁴ Of course, the “black flower” of the South was for white inmates only.⁹⁵ Slaves generally came under the jurisdiction of “plantation justice.”⁹⁶

85. *Id.* at 5.

86. *Id.* at 8.

87. *Id.* at 17.

88. *See id.* at 22.

89. *See id.* (“[I]n the end the factory system challenged each of the certainties upon which the work ethic had rested and unsettled the easy equation of work and morality in the minds of many perceptive Americans.”).

90. EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 34 (1984). Southern penitentiaries were small compared to those in the North. In 1850, for example, Georgia convicted 80 people, while in the same year Massachusetts convicted 7250 and held 1236 in its penitentiary. *See* ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 23 (1996).

91. So named for their ominous-looking exteriors. *See* MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928*, at 104 (1996) (Alabama’s); WILLIAM BANKS TAYLOR, *BROKERED JUSTICE: RACE, POLITICS, AND MISSISSIPPI PRISONS, 1798-1992*, at 30 (1993) (Mississippi’s).

92. *See* MANCINI, *supra* note 91, at 99; TAYLOR, *supra* note 91, at 15.

93. *See* James C. Bonner, *The Georgia Penitentiary at Milledgeville, 1817-1874*, 55 GA. HIST. Q. 303, 304 (1971).

94. *See* AYERS, *supra* note 90, at 35. Virginia followed the pattern of northern development in the antebellum period but turned toward the southern pattern after the Civil War. *See* KEVE, *supra* note 41, at 2 (Virginia was “forced in this different direction by desperate economic distress and the general hardening of racial attitudes.”).

95. *See* AYERS, *supra* note 90, at 61 (“The penitentiaries in the states of the lower South contained virtually no free black inmates; in the 1850s free blacks constituted only 1 percent of Alabama’s and Mississippi’s prison populations, and Georgia’s penitentiary contained no blacks at all.”).

96. *See* MICHAEL STEPHEN HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND*

Although prison labor in the North was organized under the contract system,⁹⁷ the lease ultimately became the dominant organizational form of prison labor in the South.⁹⁸ Most southern states had used some form of convict leasing during the antebellum period.⁹⁹ Leasing began in 1825, when Kentucky leased its penitentiary and its inmates to a merchant named Joel Scott.¹⁰⁰ Louisiana built a penitentiary in 1835, but started leasing nine years later when it discovered the penitentiary had become a luxury it could ill-afford.¹⁰¹

Still, convict leasing did not truly blossom until after the Civil War.¹⁰² The war left many southern penitentiaries in ruins and many southern treasuries bare.¹⁰³ Once used for military production, Georgia's Milledgeville Prison was destroyed in Sherman's march to the sea.¹⁰⁴ The South could no longer pay for its prisons. Southern lawmakers had already burdened their

AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878, at 130 (1980) ("[T]he system of trying slaves for crimes coexisted with a form of extralegal authority—namely, plantation justice . . .").

97. Of course, important differences existed between states and over time within particular states. For a more detailed discussion of how various northern and western states organized prison labor in the latter part of the 1800s, see MCKELVEY, *supra* note 45, at 126-36. For more detailed accounts of developments in particular states, see, for example, SHELLEY BOOKSPAN, *A GERM OF GOODNESS: THE CALIFORNIA STATE PRISON SYSTEM, 1851-1944* (1991); CHARLES BRIGHT, *THE POWERS THAT PUNISH: PRISON AND POLITICS IN THE ERA OF THE "BIG HOUSE," 1920-1955* (1996) (Michigan); JUDITH R. JOHNSON, *THE PENITENTIARIES IN ARIZONA, NEVADA, NEW MEXICO AND UTAH FROM 1900 TO 1980* (1991); ELINOR MYERS MCGINN, *AT HARD LABOR: INMATE LABOR AT THE COLORADO STATE PENITENTIARY, 1871-1940* (1993); John A. Conley, *Prisons, Production, and Profit: Reconsidering the Importance of Prison Industries*, 14 J. SOC. HIST. 257 (1980) (Oklahoma); and Paul Knepper, *Converting Idle Labor into Substantial Wealth: Arizona's Convict Lease System*, 31 J. ARIZ. HIST. 79 (1990).

98. See LICHTENSTEIN, *supra* note 90, at 3; see also MANCINI, *supra* note 91, at 81-212 (giving a state-by-state account of the lease system). However, some southern penitentiaries, like their northern counterparts, initially organized prison labor under the state-account system. See TAYLOR, *supra* note 91, at 23-27 (describing early Mississippi penitentiary). Some states outside the South, including Illinois and Indiana, also used the lease system for a time, see Mohler, *supra* note 17, at 561, but "[c]onvict leasing was a distinctive practice . . . of the South's treatment of its prisoners," MANCINI, *supra* note 91, at 4. Virginia never fully subscribed to the practice of leasing its inmates. See MILFRED C. FIERCE, *SLAVERY REVISITED: BLACKS AND THE SOUTHERN CONVICT LEASE SYSTEM, 1865-1933*, at 215 (1994). But cf. KEVE, *supra* note 41, at 73 ("[T]here seems no reason to suppose that the Virginia experience with contracted-out labor was materially different from its general dismal condition in other states at the time.").

99. See FIERCE, *supra* note 98, at 8.

100. See Alexis M. Durham III, *Lease System*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 277, 278 (Marilyn D. McShane & Frank P. Williams III eds., 1996).

101. See MARK T. CARLETON, *POLITICS AND PUNISHMENT: THE HISTORY OF THE LOUISIANA STATE PENAL SYSTEM* 8-9 (1971).

102. See FIERCE, *supra* note 98, at 9.

103. See AYERS, *supra* note 90, at 186; Hiller, *supra* note 31, at 254.

104. It is not clear whether the fire that engulfed the Georgia prison was started by Sherman's soldiers or by the prison's inmates. Compare AYERS, *supra* note 90, at 186 (claiming that the fire was set by Union soldiers), with Bonner, *supra* note 93, at 317 (contending that the fire was set by prisoners).

constituents with heavy taxes in order to rebuild a shattered infrastructure. Desperate for a solution, they turned enthusiastically to the lease system.¹⁰⁵ Radical Republicans of both races inaugurated the lease, and white Democrats sustained it thereafter.¹⁰⁶ Initially looked upon as a temporary expedient for a momentary crisis,¹⁰⁷ the lease system soon became an entrenched feature of southern penalty as legislators became institutionally addicted to the revenues it produced.¹⁰⁸ "The crumbling antebellum penitentiaries, granite monuments of another social order, became mere outposts of the huge and amorphous new system of convict labor."¹⁰⁹

Convict leasing satisfied the demands of the South's emerging industrialism.¹¹⁰ It also formed a vital part of the postbellum system of racial oppression.¹¹¹ Slavery had supported the plantation's agricultural production; convict leasing harnessed black labor to the needs of the South's new industries, supplying them with a reliable and predictable workforce.¹¹² Described as a "system of forced labor in an age of emancipation,"¹¹³ leasing was part of a larger system of laws that can be "understood as [an] attempt[] to enforce a labor-market cartel among white employers . . ."¹¹⁴ Combined with other measures from the Jim Crow era, convict-leasing laws prevented the migration of emancipated blacks out of the South and kept their wages artifi-

105. See AYERS, *supra* note 90, at 196.

106. See *id.* at 190 (discussing the broad political support for the convict lease system among Republicans and Democrats); CARLETON, *supra* note 101, at 18 (noting that in Louisiana both Republicans and Democrats supported the lease).

107. In fact, some states at first actually paid the lessee to take the penitentiary off their hands. See MANCINI, *supra* note 91, at 119 (Arkansas); *id.* at 132-33 (Mississippi).

108. Annoyed that "free darkies" wanted to be paid every day for their work in her mill, Scarlet O'Hara struggled with the thought of hiring convicts instead. Her conscience "battled with her desire for money," but in the end she hired the convicts—and her mill production doubled. See MARGARET MITCHELL, *GONE WITH THE WIND* 741-43, 759-61 (1936). Southern lawmakers struck the same Faustian bargain.

109. AYERS, *supra* note 90, at 186.

110. See LICHTENSTEIN, *supra* note 90, at 36 ("Republicans found in industrial slavery a telling precedent for certain aspects of their economic program, particularly railroad construction."); see also *id.* ("The political economy of Radical Reconstruction forged the chains that would bind Georgia's convicts for the rest of the century.").

111. See *id.* ("[A]s one Confederate general pointed out to recalcitrant Georgians, the language of the Thirteenth Amendment still allowed the southern states to use the criminal law to sell blacks back into bondage . . .").

112. See AYERS, *supra* note 90, at 194 ("Convict labor, not unlike slavery, insulated the lessee from 'frightening upheavings of labor' and labor shortages."); MANCINI, *supra* note 91, at 109 ("[I]t was this attribute of *reliability* . . . for which lessees were willing to pay . . ."); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 80-81 (1996) (observing that the convict lease system "provided employers with a regularity that free labor could never match," since prisoners were "always ready for work").

113. LICHTENSTEIN, *supra* note 90, at 3.

114. Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1162 (1984).

cially depressed.¹¹⁵ Of course, the lease system was formally based on criminality, not on race, but the distinction was often lost in the realities of criminal justice under Jim Crow.¹¹⁶

Convicts subject to the lease typically did work free labor was unwilling to do, and their labor left an enduring mark on the landscape of the New South.¹¹⁷ Convicts made bricks for Atlanta's Chattahoochee Brick Company,¹¹⁸ built the railroads that ran across western North Carolina,¹¹⁹ mined coal for the Tennessee Coal, Iron and Railroad Company,¹²⁰ extracted iron ore from the mines surrounding Birmingham,¹²¹ drained the swamps of the Mississippi Delta,¹²² and made fertilizer out of phosphate taken from the mines of Florida.¹²³ Other convicts waded in Florida's swamps, stripping trees to extract the raw material used to make turpentine.¹²⁴

The lease system produced income for the lessees and the state alike. Lessees often realized large returns on their investment.¹²⁵ Having delegated to the lessee the costly duty of providing for the inmates' custody and care, the state likewise discovered that the lease could make punishment profitable.¹²⁶

Not surprisingly, a close relationship developed between lessees and state officials. Lawmakers supported the lessees with contracts and convicts,

115. See *id.* at 1180-84 (explaining role of convict leasing within this larger system); see also DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* 31-34 (1978) (discussing convict labor's impact on wages); Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, 30 SOC. PROBS. 555, 556 (1983) (discussing the use of convict leasing as a functional replacement for slavery); William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 34 (1976) ("Convict-labor laws began where the surety system ended . . ."); Matthew J. Mancini, *Race, Economics, and the Abandonment of Convict Leasing*, 63 J. NEGRO HIST. 339, 339 (1978) ("[T]he lease system was a component of [a] larger web of law and custom which effectively insured the South's racial hierarchy.").

116. Some of the leased convicts were of course hardened criminals; others were innocent. But "[m]ost lay somewhere in between, many of them given harsh sentences for petty transgressions of laws specifically designed to control impoverished African-Americans." LICHTENSTEIN, *supra* note 90, at xvi.

117. See MANCINI, *supra* note 91, at 41-42 (noting the use of poor conditions or punishment to force convicts to labor).

118. See *id.* at 90 (the company leased two-thirds of the state's convicts).

119. See *id.* at 205-07.

120. See *id.* at 22, 99, 155, 209.

121. See *id.* at 116.

122. See LICHTENSTEIN, *supra* note 90, at xv.

123. See *id.*; see also MANCINI, *supra* note 91, at 188 ("[P]hosphate . . . increased the price of convict labor, and by doing so it fixed the parasitic practice even more firmly on the lifeblood of Florida's commerce, politics, and society.")

124. See MANCINI, *supra* note 91, at 45-47.

125. See AYERS, *supra* note 90, at 194.

126. See *id.* at 196 ("Nationally, all prisons which did not use the lease system earned only 32 percent of their total [labor] expenses, while those which did take advantage of the demand for convict labor outside the prison walls earned 267 percent.").

and lessees supported the lawmakers with contributions.¹²⁷ It's probably no coincidence that in Georgia, for example, Joseph E. Brown, who had served as the state's governor and chief justice, became a millionaire as one of its biggest lessees.¹²⁸

Southern prosecutors and courts also played a role in maintaining the lease system. Before the War, southern penitentiaries mainly housed white immigrants from urban areas.¹²⁹ Afterward, the "black belt counties" became the major suppliers of convicts.¹³⁰ Nor was it unusual for the supply of convicts to track the labor demands of industry. As industrial production increased, so too did the number of convicts. Indeed, some local criminal courts were little more than "conveyor belts" supplying convicts to industries in need of workers.¹³¹ In Florida, the practice even acquired a name; convicts caught in the system and sent to work in the "American Siberia"¹³² were said to have been "turpented."¹³³

Once in the lease's grasp, inmates were subject to unspeakable brutality.¹³⁴ Indeed, the lease system may have invited even greater physical abuse than did slavery. The slave owner had a long-term economic interest in the slave's well-being. The lessee had no such interest in the well-being of the inmate. Lessees knew they would eventually lose control over an inmate's labor, either at the expiration of the lease or when an inmate's term of imprisonment came to an end.¹³⁵ Lessees sometimes held inmates beyond the dates of their scheduled release,¹³⁶ and they routinely worked inmates hardest as the lease was about to expire or an inmate's release date approached.¹³⁷ The mortality rate of leased prisoners was appalling, ranging at its worst from 17-40% annually.¹³⁸ An Alabama doctor in 1883 "estimated that most convicts died within three years."¹³⁹

127. *See id.* at 195.

128. *See OSHINSKY, supra* note 112, at 64.

129. *See AYERS, supra* note 90, at 197.

130. *See id.*

131. *Cf. JESSE F. STEINER & ROY M. BROWN, THE NORTH CAROLINA CHAIN GANG: A STUDY OF COUNTY CONVICT ROAD WORK 6* (Patterson Smith 1969) (1927) ("[T]here is evidence in some instances that the mill of criminal justice grinds more industriously when the convict road force needs new recruits.").

132. *See generally J.C. POWELL, THE AMERICAN SIBERIA OR FOURTEEN YEARS EXPERIENCE IN A SOUTHERN CONVICT CAMP* (Robert M. Fogelson & Richard E. Rubenstein eds., Arno Press & N.Y. Times 1969) (1891) (account of a "captain" of a Florida convict camp).

133. Mohler, *supra* note 17, at 567.

134. *See MANCINI, supra* note 91, at 81-212 (describing convict leasing in various southern states); POWELL, *supra* note 132, at 7-26 (summarizing acts of brutality in a Florida camp).

135. *See Roback, supra* note 114, at 1170 ("[C]onvicts had no 'scrap' or 'resale' value.").

136. *See FIERCE, supra* note 98, at 2.

137. *See, e.g., LICHTENSTEIN, supra* note 90, at 155.

138. *See AYERS, supra* note 90, at 200-01.

139. Adamson, *supra* note 115, at 566; *see also OSHINSKY, supra* note 112, at 61 ("The average life of a convict in Texas [under the lease] was about seven years."). Escapes were also fre-

C. *The Fall of Prison Labor, 1870-1935*

Opposition to prison labor existed side-by-side with the penitentiary from the beginning.¹⁴⁰ As labor unions began to grow and coalesce in the latter part of the nineteenth century, the pressure to end the leasing and contracting of prison labor intensified. Convict labor became a major political issue. In 1913, the governor of Oregon lamented that the "prison labor problem, like the poor, seems to be ever with us."¹⁴¹ He was overly pessimistic. By the mid- to late-1930s, the problem would be solved, but the "solution" would leave behind a legacy of idleness.

1. *The fall of the contract.*

In the early 1800s, many states still organized prison labor under the state-account system, which fledgling labor organizations described as a "detestable" state monopoly.¹⁴² Organized labor continued its resistance to prison industries when the bidding for inmate labor under the contract system failed to elevate the price of prison labor to the level of free-market wages.¹⁴³ Although the fragmented nature of the early union movement hampered labor's initial efforts to curtail prison industries,¹⁴⁴ labor opposition to the contract system steadily mounted and began to make headway with the formation of the national unions of the 1860s.¹⁴⁵

quent, despite the bloodhounds often kept on hand to track escapees down. According to one account, some 11,000 inmates escaped during a two-year span. See Mohler, *supra* note 17, at 564 (citing George Washington Cable, *The Convict Lease System in the Southern States*, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS 296, 297 (1883)).

140. See LEWIS, *supra* note 45, at 188 (noting opposition of New York shoemakers to shoe-making by inmates at New York's Newgate Prison).

141. Oswald West, *The Problem of Prison Labor*, 46 ANNALS AM. ACAD. POL. & SOC. SCI. 45, 45 (1913).

142. See GILDEMEISTER, *supra* note 65, at 132; see also LEWIS, *supra* note 45, at 188-89 (describing Jacksonian-era antipathy toward monopolistic behavior).

143. See E.T. Hiller, *Labor Unionism and Convict Labor*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 851, 868 (1915). Assuming no differences between the quality of free labor and prison labor, open bidding for convict labor should tend to equalize the convict "wage" and the prevailing wage of free labor. See Roback, *supra* note 114, at 1181 fig.3, 1183 fig.4. However, the historical evidence on this point is conflicting. Compare LEWIS, *supra* note 45, at 189 ("Some contracts . . . became virtually self-perpetuating despite the existence of legal provisions which theoretically threw them open to periodic competition."), and Hiller, *supra*, at 868 (stating that labor erroneously "supposed that free competition in bidding for the labor of convicts would remove the menace" of convict labor), with MANCINI, *supra* note 91, at 97, 109, 111, 181, 188 (arguing that the cost of the lease in Georgia, Alabama, Texas, and Florida eventually approximated the free-wage rate). Mancini attributes the equalization of convict and free-labor wage rates in the South to the practice of subleasing and to the increasing value of commodities produced by prison labor. See *id.* at 224-25.

144. See Mohler, *supra* note 17, at 560, 573.

145. See *id.* at 568-80 (tracing unions' growth and opposition); see also GILDEMEISTER, *supra* note 65, at 196-224 (discussing organized labor's campaign against the contract system); Hiller, *supra* note 143, at 872-79 (noting the growth of unions and the progress made against convict la-

At first, labor opposition to prison industries focused on the need to preserve the dignity of free labor. The early labor movement's belief in the dignity of labor had already been shaken by the growing system of wage labor, which some unionists believed was little more than a form of slavery.¹⁴⁶ Allowing prisoners to work and manufacture goods for sale on the open market was a further insult to labor's honor. In Jacksonian-era New York, mechanics refused to hire ex-convicts, lest the association degrade their trade.¹⁴⁷ By 1900, however, preserving the dignity of labor became less prominent in the rhetoric of organized labor's opposition to prison industry, and the economic threat of prison labor became more prominent.¹⁴⁸

Manufacturers forced to compete with prison industries also began to react to the economic menace of prison labor.¹⁴⁹ In 1886, a group of manufacturers gathered in Chicago to form the National Anti-Convict Contract Association.¹⁵⁰ Meeting at the Grand Pacific Hotel, its membership resolved to "discover[] and secur[e] the adoption of that method of employing the prison population . . . which shall be the least burdensome to all labor and least oppressive to manufacturing interests—all proper conditions considered."¹⁵¹ Although the late nineteenth century was generally a period of intense industrial strife between organized labor and capital,¹⁵² the two adversaries managed to close ranks in their opposition to prison labor.¹⁵³

Fearful of the cost of nonproductive prisons, state lawmakers tried to resist the demands of organized labor and capital.¹⁵⁴ For the state, the contract system was an all-around success: "The security record of the prisons was generally excellent, their operation and labor was sufficiently onerous to mete just retribution to the criminal, and, most importantly, many state prisons generated significant revenues to defray operating expenses."¹⁵⁵ For ex-

bor).

146. Cf. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 769 ("[T]he labor movement [in the 1870s] was forging an . . . ideology which held that being forced to sell his labor contradicted the worker's status as a citizen.").

147. See LEWIS, *supra* note 45, at 190; Hiller, *supra* note 31, at 256-57; Hiller, *supra* note 143, at 869-70; see also Mohler, *supra* note 17, at 572 ("[T]he 'hardworking and honest mechanic is insulted by having felons put on an equal footing with him.'" (quoting PROCEEDINGS OF THE NATIONAL PRISON ASSOCIATION 248 (1886))).

148. See Mohler, *supra* note 17, at 572.

149. See GILDEMEISTER, *supra* note 65, at 208-09 ("Reports from . . . state investigators and labor groups proclaimed the same message: *manufacturers*, as much as workers, can be hurt by convict labor . . .").

150. See Mohler, *supra* note 17, at 569-70.

151. 1886 COMMISSIONER LABOR, ANN. REP. 366 [hereinafter 1886 ANNUAL REPORT].

152. See FOSTER RHEA DULLES & MELVYN DUBOFSKY, *LABOR IN AMERICA: A HISTORY* 108-19 (5th ed. 1993).

153. See GILDEMEISTER, *supra* note 65, at 218 (noting the "alliance between labor and capital against competition with convict labor").

154. See, e.g., MCKELVEY, *supra* note 45, at 185-88.

155. GILDEMEISTER, *supra* note 65, at 226.

ample, the labor of New York's inmates in the quarries of Sing Sing Prison not only supplied New York City with stone to build some of its most magnificent buildings, it also supplied the state treasury with revenue.¹⁵⁶

On occasion, taxpayers too complained about the mounting union pressure to abolish or curtail the contract system. According to one New York resident, the campaign against prison labor was "a wish to create a distinction in favor of the mechanic, or a wish to tax the farmer, the merchant, and professional men, to support the convicts in our State Prisons without labor, for the sole purpose of raising the wages of the mechanic."¹⁵⁷ Still, not all taxpayers were so astute, and defenders of the contract system realized the uphill battle they faced to make the "[p]ublic . . . see that if the convict . . . does not produce anything, free labor in the end must support him."¹⁵⁸

Wardens and prison reformers also defended the contract system.¹⁵⁹ Abolishing it, they feared, would force prisoners into idleness and undermine prison discipline, destroying any hope of reform. According to Zebulon Brockway, father of the Elmira Reformatory, without labor the "penitentiary no longer exists, it becomes a great jail instead."¹⁶⁰

Yet many reformers were becoming increasingly uneasy with the contract system, though they remained firmly committed to the idea of prison labor. For them, the contractor's pursuit of profit too often conflicted with the pursuit of reform.¹⁶¹ The contractor, complained the reformers, was a mere outsider who cared nothing about the "interest of the prison as a reformatory agent"¹⁶² Moreover, the reformers accused some contractors of practically running the prison, becoming the "power behind the throne

156. See Mohler, *supra* note 17, at 560 (noting that Sing Sing made a net profit of nearly \$29,000 in 1835); see also MARK COLVIN, *PENITENTIARIES, REFORMATORIES, AND CHAIN GANGS: SOCIAL THEORY AND THE HISTORY OF PUNISHMENT IN NINETEENTH-CENTURY AMERICA* 96 (1997) (noting that "estimat[ing] the financial success of prison industries" is "difficult" but concluding that Auburn was profitable "[o]verall, at least before 1840"); LEWIS, *supra* note 45, at 186 (commenting that Sing Sing's earnings over 1835-1841 exceeded expenses by more than \$94,000); Durham, *supra* note 76, at 448 (describing Sing Sing's eventual profitability after initial losses). *But cf.* HIRSCH, *supra* note 16, at 96 ("[M]ost penitentiaries operated at a consistent loss; at best, they had spotty records of earnings performance. . . . [P]rison authorities habitually endeavored to camouflage institutional finances.").

157. LEWIS, *supra* note 45, at 192 (citation omitted).

158. Joseph P. Beyers, *Prison Labor*, in 2 *CORRECTION AND PREVENTION: PENAL REFORM AND REFORMATORY INSTITUTIONS* 193, 197 (Charles Richmond Henderson ed., 1910) (quoting Otis Fuller).

159. See Mohler, *supra* note 17, at 557-58, 561.

160. GILDEMEISTER, *supra* note 65, at 230. For a historical account of the Elmira Reformatory, see ALEXANDER W. PISCIOTTA, *BENEVOLENT REPRESSION: SOCIAL CONTROL AND THE AMERICAN REFORMATORY-PRISON MOVEMENT* (1994).

161. See Mohler, *supra* note 17, at 551, 576.

162. E.C. WINES, *THE STATE OF PRISONS AND OF CHILD-SAVING INSTITUTIONS IN THE CIVILIZED WORLD* 110 (Patterson Smith 1968) (1880).

greater than the throne”¹⁶³ By 1871, the influential National Congress on Penitentiary and Reformatory Discipline declared that the contract system had become “prejudicial alike to discipline, finance and the reformation of the prisoner.”¹⁶⁴ Thus, whereas the unions saw the contract system as an unwanted source of competition, the reformers saw it as an unnecessary obstacle to the moral reform of the inmates.¹⁶⁵

Still, some reformers recognized that the contract system itself was not to blame. In their 1867 *Report on the Prisons and Reformatories of the United States and Canada*, Enoch Wines and Theodore Dwight explained that it was “the contract system . . . , added to the system of political appointments, which necessarily involves a low-grade of official qualification and constant changes in the prison staff, [that] render[ed] nugatory, to a great extent, the whole theory of our penitentiary system.”¹⁶⁶ Far from rejecting the contract system altogether, Wines and Dwight applauded how it was administered in some prisons, such as Ohio’s, in which it had been “brought under subjection to the law” and “regulated in all its parts and ramifications.”¹⁶⁷ Moreover, despite the problems the contract system tended to create, Wines thought it should be retained as long as prison officials themselves lacked the skills necessary to run successful prison industries.¹⁶⁸

The unions proposed various ways to reduce the competitive threat of prison labor: imposing price controls (either by setting a minimum price for the contract or for the goods produced), limiting the number of prisoners who could be employed in any particular industry, limiting prison-made goods to those that would otherwise be imported from another state or overseas, lim-

163. *Id.*; see also DOROTHEA LYNDE DIX, REMARKS ON PRISONS AND PRISON DISCIPLINE IN THE UNITED STATES 10 (Patterson Smith 1967) (2d ed. 1845) (“It is desirable that penitentiaries should not be a cost to government; on the other hand[,] they should not be a source of profit.”).

164. TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 543 (E.C. Wines ed., 1871) [hereinafter TRANSACTIONS OF THE NATIONAL CONGRESS].

165. The difference between the two sides came to the fore when penologist Zebulon Brockway proposed replacing the contract with the piece-price system. Under the piece-price system, the contractor supplied tools and raw materials, but prison officials oversaw the production itself. Finished goods would then be sold on the open market. See note 24 *supra*. Although this system removed the contractor from the prison and thus satisfied the concerns of wardens and penologists, the unions remained unappeased because prison goods were still sold on the open market in competition with free labor. See Hiller, *supra* note 31, at 258 (“[O]rganized labor opposed the . . . piece-price system[] . . .”).

166. E.C. WINES & THEODORE W. DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA 265 (1867) (emphasis added); see also TRANSACTIONS OF THE NATIONAL CONGRESS, *supra* note 164, at 543 (“[W]e regard the contract system of prison labor, as now commonly practised in our country, as prejudicial alike to the discipline, finance and the reformation of the prisoner, and sometimes injurious to the interests of the free laborer.”) (emphasis added).

167. WINES & DWIGHT, *supra* note 166, at 251.

168. See WINES, *supra* note 162, at 110 (explaining that prison officials are usually inexperienced because they are political appointees and have a high turnover rate).

iting the sale of prison-made goods to state agencies, banning prison-made goods from entering interstate commerce, limiting the hours inmates could work, requiring contractors to pay inmates free-market wages, restricting the introduction of power machinery into prison workshops, banning the production of certain goods, and discouraging the purchase of prison-made goods by labeling them "prison-made."¹⁶⁹ One proposal even advocated establishing a penal colony in Alaska.¹⁷⁰

The first real battle over the future of prison industry took place in New York, where labor unions had begun to organize early in the nineteenth century. Soon after its formation in 1833, the New York Trades' Union launched a sustained legislative campaign against prison-made goods,¹⁷¹ and the General Trades' Union of New York City and Vicinity, founded around the same time, included among its goals the elimination of convict labor.¹⁷² Defenders of prison labor responded with a series of incremental strategic retreats. In the 1830s and 1840s, for example, the New York legislature regulated the contracting process and prevented inmates from being trained in or performing any "mechanical trade."¹⁷³ Other northern states enacted similar piecemeal reforms.¹⁷⁴

When depressions hit the United States in the 1870s and 1890s, the resulting unemployment intensified labor's efforts to shut down prison industry once and for all.¹⁷⁵ At the same time, trade unions amalgamated and federalized, gaining political strength.¹⁷⁶ The solution to the prison labor problem on which the contending forces ultimately settled—the state-use system—was a compromise.¹⁷⁷ Prisoners would still work, but the state would be the

169. These proposed restrictions are summarized in Mohler, *supra* note 17, at 577; see also 1886 ANNUAL REPORT, *supra* note 151, at 382-96 (discussing proposed restrictions); EDWIN H. SUTHERLAND, CRIMINOLOGY 458-62 (Edward C. Hayes ed., 1924) (discussing the history of free labor's opposition to prison labor and listing various restrictive measures proposed by free labor).

170. See GILDEMEISTER, *supra* note 65, at 235. One hat manufacturer suggested the same solution and added: "I do not know that Alaska is good for much of anything else." *Id.*

171. See Mohler, *supra* note 17, at 560.

172. See LEWIS, *supra* note 45, at 191-92 (listing various unions and groups that exerted pressure on the legislature for the passage of restrictive laws).

173. *Id.* at 197. The New York Assembly's decision in 1844 to build the state's third penitentiary next to an iron mine was also intended to protect and accommodate the interests of free workers. Built in Clinton, New York, the prison was dubbed "Dannemora," after a well-known Swedish iron center. The idea was to have the prisoners mine iron ore since New York had no domestic iron mining industry. Upon hearing news of the state assembly's approval of Dannemora, workers in New York City sent a 4500-signature petition urging the senate to give its quick approval. See *id.* at 199-200. Ultimately, however, Dannemora's mining operation was a failure. See *id.* at 260-63.

174. See GILDEMEISTER, *supra* note 65, at 242-43 (noting the New Jersey legislature's decision in 1881 to limit the number of convicts in the New Jersey Penitentiary that could be employed in any one industry).

175. See Mohler, *supra* note 17, at 568-69.

176. See *id.* at 574-77.

177. See *id.* at 592 ("[F]ree labor and the penologists . . . [eventually] came to an agreement

only buyer of their labor and the only market for their goods. The state-use system meant that free workers would no longer be forced to compete with prisoners for private-sector jobs and that prison-made goods would no longer compete with free labors' goods on the open market. By the turn of the century, the state-use system had spread across much of the country.¹⁷⁸

2. *The fall of the lease.*

Unions opposed convict labor in the South just as they had in the North. The opposition of southern miners, most notably those in eastern and middle Tennessee, was especially strong. Their ire peaked when mine owners began hiring workers who had learned their trade as convicts.¹⁷⁹ In 1885, workers in Birmingham, who complained that the city had become the "Botany Bay of the Commonwealth," founded the Anti-Convict League to oppose prison labor.¹⁸⁰ For the mine owners, however, the lease system kept coal prices down and helped frustrate workers' efforts to act collectively.¹⁸¹

As pressure from organized interests mounted, so too did reports of the lease's brutalities. George W. Cable's famous 1885 exposé, *The Silent South*,¹⁸² was especially shocking. One of the most tragic and widely circulated stories came from Florida's turpentine swamps. Martin Tabert, a white twenty-two-year-old, hailed from North Dakota.¹⁸³ He had grown tired of work on the family farm and left to see the world. He ended up in Florida and stole a ride through the panhandle on a freight train. Convicted of vagrancy, he was sentenced to county jail for ninety days. In exchange for a twenty dollar commission, the local sheriff leased Martin to the Putnam Lumber Company, which sent him to the swamps to strip turpentine. Two months later, he was dead. Forced to "shovel[] mud in hip-deep water for

as to [the contract system's] undesirability and joined forces for its abolition.").

178. See *id.* at 578 ("By 1899 thirty-five states had the state use system in whole or in part.").

179. The opposition of coal miners, who sometimes used force to set the convicts free, eventually ended the lease system in Tennessee. See RONALD L. LEWIS, *BLACK COAL MINERS IN AMERICA: RACE, CLASS, AND COMMUNITY CONFLICT, 1780-1980*, at 15-35 (1987); see also FIERCE, *supra* note 98, at 198 (suggesting that the end of convict leasing in Tennessee was the direct result of the miners' 1892 uprising); LICHTENSTEIN, *supra* note 90, at 95-104 (describing a violent uprising by Tennessee miners); W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 838 (1987) (describing violence by miners in eastern Tennessee).

180. AYERS, *supra* note 90, at 214; see also ROBERT DAVID WARD & WILLIAM WARREN ROGERS, *CONVICTS, COAL, AND THE BANNER MINE TRAGEDY* 45-50 (1987) (discussing the activities of Alabama miners' unions in the late 1800s).

181. See AYERS, *supra* note 90, at 212.

182. GEORGE W. CABLE, *THE SILENT SOUTH, TOGETHER WITH THE FREEDMAN'S CASE IN EQUITY, THE CONVICT LEASE SYSTEM, THE APPENDIX TO THE 1889 EDITION, AND EIGHT UNCOLLECTED ESSAYS ON PRISON AND ASYLUM REFORM* (Patterson Smith 1969) (1885).

183. For the complete account, see N. Gordon Carper, *Martin Tabert, Martyr of an Era*, 52 FLA. HIST. Q. 115 (1973).

fifteen hours a day," Martin could not keep pace and was beaten to death.¹⁸⁴ The subsequent investigation attracted national attention—in part because of Tabert's race—and helped end convict leasing in Florida.¹⁸⁵

Humanitarianism no doubt played some role in bringing the lease to an end. However, according to a recent and comprehensive account of the lease system, changing economics probably played a larger role in the system's demise than did good will.¹⁸⁶ Humanitarian sentiment provided a steady source of pressure on the system, but the system disappeared only when it became unprofitable.¹⁸⁷ In Georgia, for example, a sublease eventually cost \$670 per convict, a price equal to a free laborer's wage.¹⁸⁸ Under these circumstances, a slow economy would leave lessees faced with the prospect of being "stuck with crews of laborers whom they had to feed, clothe, and attend to but whom they could not work."¹⁸⁹

Like its birth, the eventual death of convict leasing was halting and uneven. Mississippi was the first state to stop leasing, ending the practice in 1894.¹⁹⁰ Tennessee, Louisiana, South Carolina, and Georgia ended leasing in the decades surrounding the turn of the century.¹⁹¹ Arkansas abolished its lease in 1913, though not before its progressive (and lame duck) governor tried to prod the state legislature into action by issuing 360 inmates a Christmas pardon.¹⁹² Leasing continued in Alabama until 1919 and in Florida until 1928.¹⁹³ North Carolina did not fully abandon its lease until 1933.¹⁹⁴

When the southern states finally abolished the lease system, they reorganized prison labor under the state-use system, just as the northern states had done when they dismantled the contract system. As it had in the North,

184. OSHINSKY, *supra* note 112, at 75.

185. See Carper, *supra* note 183, at 115.

186. See MANCINI, *supra* note 91, at 181 ("The economic factor has not been noted in the few commentaries about the cessation of convict leasing, but it was at least as important as the political pressure and the public outrage . . .").

187. See *id.*; see also Mancini, *supra* note 115, at 340 ("Public indignation constituted a chorus of disapproval in the background of these events, paralleling rather than causing abolition.").

188. See MANCINI, *supra* note 91, at 225.

189. *Id.*

190. See FIERCE, *supra* note 98, at 193 fig.5.1.

191. See *id.*

192. See George W. Donaghey, *Why I Could Not Pardon the Contract System*, 46 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 27 (1913); see also CLYDE CROSLY, UNFOLDING MISCONCEPTIONS: THE ARKANSAS STATE PENITENTIARY, 1836-1986, at 41-42 (1986) (describing Governor Donaghey's action as "his personal method of striking a blow at the corrupt leasing system"). Donaghey pardoned just enough convicts to overcome the legislature's objection that the prison population without leasing would be too large to maintain on the state farm. See MANCINI, *supra* note 91, at 129-30.

193. See FIERCE, *supra* note 98, at 193 fig.5.1.

194. See *id.* Leasing ended later in North Carolina than it did in other southern states partly because state officials, not lessees, were responsible for inmates' custody and discipline. See *id.* at 216-18.

the control of convict labor in the South shifted from private to public hands. However, the state-use system in the South took a different shape than it did in the North. Whereas inmates in the North labored behind prison walls manufacturing goods for sale to the state, inmates in the South worked on chain gangs and state farms.¹⁹⁵ Southern states bought land for prison farms during the 1880s and 1890s,¹⁹⁶ and the chain gang, born in Georgia in 1908, emerged as part of the "good roads movement."¹⁹⁷ Stretching throughout the South by the 1920s and 1930s,¹⁹⁸ the gangs built the roads needed for the nation's latest technological innovation: the automobile.¹⁹⁹ Chained convicts, mostly black, became a common sight along southern roadways. "Bad boys," a Georgia folk saying went, "make good roads."²⁰⁰

The chain gangs did not last long. In response to the Great Depression, the federal government prohibited the use of convict labor to build roads financed with federal money.²⁰¹ The Depression also prompted fresh complaints that the gangs took jobs rightfully belonging to free labor.²⁰² Once again, social critics exposed abuses. Robert Elliot Burns' *I Am a Fugitive*

195. See MANCINI, *supra* note 91, at 221-22; Jane Zimmerman, *The Penal Reform Movement in the South during the Progressive Era, 1890-1917*, 17 J.S. HIST. 462, 463 (1951) (noting that after the collapse of the lease southern states "turned to two types of outdoor labor—farm work and road building").

196. See, e.g., AYERS, *supra* note 90, at 221 (discussing Mississippi, the Carolinas, Alabama, Virginia, and Georgia); KEVE, *supra* note 41, at 92 (noting that Virginia purchased land for a prison farm in 1894). Many of these farms bear names—e.g., Parchman, Angola, Cummins—that would become synonymous with southern penalty. State prison farms became increasingly inefficient during the 1960s, and many states eventually discovered that they could purchase their prisoners' food for less than the prisoners could produce it. See *id.* at 258.

197. LICHTENSTEIN, *supra* note 90, at 15, 159-85.

198. See Marilyn D. McShane, *Chain Gangs*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra* note 100, at 71; see also LICHTENSTEIN, *supra* note 90, at 3 ("After the abolition of leasing, in Georgia and many other states, convicts became the inalienable property of the state, and labored to construct and repair county and municipal roads."); Daniel T. Brailsford, Note, *The Historical Background and Present Status of the County Chain Gang in South Carolina*, 21 S.C. L. REV. 53, 54-58 (1968) (describing development of the chain gang in the South). Western states also relied on chain gangs. See Mohler, *supra* note 17, at 586 ("Nearly every Western state put its felons on the roads.").

199. Prior to the use of convict labor, counties "warned out" able-bodied free men to work on the roads "four or five days" out of the year. See LICHTENSTEIN, *supra* note 90, at 161 (discussing the demise of this system in North Carolina); see also *Butler v. Perry*, 240 U.S. 328, 333 (1916) (upholding the practice of "warning out" against a Thirteenth Amendment challenge). Conscripted labor proved less satisfactory than convict labor for a variety of reasons, including the unwillingness of poor and propertyless persons to "work[] the roads for the benefit of landowners more dependent on commerce." LICHTENSTEIN, *supra* note 90, at 163.

200. LICHTENSTEIN, *supra* note 90, at 152; see also Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict Is a Slave,"* 59 J.S. HIST. 85, 103 (1993) ("The improvement of roads in Georgia was in great measure the result of the labor of five thousand convicts . . .").

201. See LICHTENSTEIN, *supra* note 90, at 190-91.

202. See *id.* at 190.

from a Georgia Chain Gang!²⁰³ dramatized these horrors and turned the Georgia gang into a national shame. Race also figured in the decline of the gangs. As the number of white inmates in them increased, the gangs became less popular.²⁰⁴ By the 1940s, the gangs had all but vanished.²⁰⁵

3. Federal intervention.

Opponents of convict labor concentrated their early efforts at the state level. Although they succeeded in securing restrictions on the sale of prison labor and on the intrastate sale of prison-made goods, the dormant Commerce Clause protected the free flow of prison-made goods from one state into another.²⁰⁶ Initial attempts to enlist federal power against convict labor failed. Defending the interests of state legislators and governors, the Senate defeated restrictive legislation passed in the House.²⁰⁷

With the onset of the Great Depression, the pressure for federal action grew. Congress eventually responded with a series of increasingly more restrictive measures, beginning in 1929 with the Hawes-Cooper Act.²⁰⁸ The Act divested prison-made goods of their interstate character and made them subject to existing state-law restrictions on their sale.²⁰⁹ In effect, Hawes-

203. ROBERT E. BURNS, *I AM A FUGITIVE FROM A GEORGIA CHAIN GANG!* (1932); see also *Johnson v. Dye*, 175 F.2d 250, 255 (3d Cir.) (finding treatment of Georgia chain gang escapee constituted "cruel and unusual punishment"), *rev'd on other grounds*, 338 U.S. 864 (1949) (per curiam); STEINER & BROWN, *supra* note 131, at 83-86 (detailing brutal treatment of prisoners). Inmates were also subject to abuse at the new state farms. See, e.g., CROSLLEY, *supra* note 192, at 47 ("Arkansas penal farms were . . . brutal . . .").

204. See LICHTENSTEIN, *supra* note 90, at 190 ("[I]ncreased visibility of white prisoners began to erode the public faith in the benefits and justice of criminal labor.").

205. See McShane, *supra* note 198, at 71 (observing that chain gangs served as a system of punishment from 1910 until 1945).

206. See *People v. Hawkins*, 51 N.E. 257, 262 (N.Y. 1898) (holding that a New York law requiring prison-made goods to be labeled as such violated state substantive due process guarantees and the federal Commerce Clause); *Arnold v. Yanders*, 47 N.E. 50, 51 (Ohio 1897) (holding that an Ohio law licensing dealers in out-of-state prison-made goods violated the Commerce Clause).

207. See Frank T. Flynn, *The Federal Government and the Prison-Labor Problem in the States I: The Aftermath of Federal Restrictions*, 24 SOC. SERV. REV. 19, 20 & n.9 (1950).

208. Act of Jan. 19, 1929, ch. 79, 45 Stat. 1084 (codified as amended at 49 U.S.C. § 11507 (1994)).

The Act took effect five years later. See *id.* The delay was intended to give state lawmakers and wardens a chance to adjust to the new environment the Act would create. To help the states make the transition, the federal government established the Prison Industries Reorganization Administration ("PIRA"). See Frank T. Flynn, *The Federal Government and the Prison-Labor Problem in the States II: The Prison Industries Reorganization Administration*, 24 SOC. SCI. REV. 213, 213-14 (1950). Although the PIRA was supposed to help states secure federal funding to ease the transition to the state-use system, in the end it only offered advice. See *id.* at 224-25 ("[I]t is certain that the PIRA did not pursue an aggressive policy in trying to obtain funds for the states."). The PIRA ultimately lost congressional support and died a quiet death on June 30, 1938. See *id.* at 232.

209. See Act of Jan. 19, 1929, ch. 79, 45 Stat. 1084 (codified as amended at 49 U.S.C. § 11507 (1994)); see also FRANK TANNENBAUM, *CRIME AND THE COMMUNITY* 390-401 (1938) (detailing the effect of the Hawes-Cooper Act).

Cooper allowed one state to prevent another state from "dumping" its prison-made goods. In 1935, Congress enacted the Ashurst-Sumners Act,²¹⁰ which added federal enforcement power to Hawes-Cooper and made it a federal crime to knowingly transport prison-made goods into a state that prohibited their sale.²¹¹ Finally, in 1940, Congress amended the Ashurst-Sumners Act and made the interstate transportation and sale of prison-made goods itself a federal crime no matter what state law provided.²¹²

The Hawes-Cooper and Ashurst-Sumners Acts eliminated whatever room remained for prison industries to sell their goods on the national market. As a result, the state-use system became the only real way of organizing prison labor. Writing in 1931, the Wickersham Commission predicted that the Hawes-Cooper Act "will practically force prisons still having the contract system to abandon it."²¹³ In 1932, two years before the Hawes-Cooper Act went into force, 16% of the nation's inmates worked in contract systems, 42% in state-use systems, and 23% on public works.²¹⁴ By 1940, six years after the effective date of the Act, almost all prisoners worked for the state.²¹⁵

Despite the hope everyone invested in it, the state-use system never lived up to its billing. Inmates were supposed to remain productively busy, but idleness became endemic. Soon after New York adopted the state-use system in 1894, one observer noted: "[T]here has been more idleness in state prisons and county penitentiaries than was known throughout the whole pre-

210. Act of July 24, 1935, ch. 412, 49 Stat. 494 (codified as amended at 18 U.S.C. §§ 1761-1762 (1994)).

211. See, e.g., Jefferey T. Walker, *Ashurst-Sumners Act*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra* note 100, at 41, 41-42 (providing portions of the text of the Ashurst-Sumners Act as originally enacted). Congress also imposed restrictions on the sale of prison-made goods. For example, the Walsh-Healey Act of 1936, ch. 881, § 1, 49 Stat. 2036 (codified as amended at 41 U.S.C. § 35 (1994)), prohibited the use of prison labor on government contracts over \$10,000, and the Tariff Act of 1930, tit. III, ch. 497, § 307, 46 Stat. 689 (codified as amended at 19 U.S.C. § 1202 (1994)), prohibited the importation of products made from prison labor. See *id.* § 307 (codified as amended at 19 U.S.C. § 1307 (1994)). Federal law also prohibited the postmaster general from purchasing prison-made goods. See Act of Aug. 12, 1970, ch. 22, § 2201, 84 Stat. 742 (codified as amended at 39 U.S.C. § 2201 (1994)).

212. See 18 U.S.C. § 1761; see also Walker, *supra* note 211, at 42 (describing how the amendments to the Ashurst-Sumners Act "completely prohibit[ed] the interstate shipment of prison goods, regardless of the laws of the state to which the goods would be shipped."). The Supreme Court upheld the Hawes-Cooper and Ashurst-Sumners Acts against constitutional challenges. See *Kentucky Whip & Collar Co. v. Illinois Central R.R. Co.*, 299 U.S. 334, 352-53 (1937) (upholding Ashurst-Sumners Act); *Whitfield v. Ohio*, 297 U.S. 431, 436-41 (1936) (upholding Hawes-Cooper Act).

213. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, NO. 9, REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 83 (1931) [hereinafter WICKERSHAM COMMISSION].

214. See DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 142 (1980); see also FUNKE ET AL., *supra* note 17, at 22 (comparing prisoners' production totals under each system of labor for the years 1923, 1932, and 1940).

215. See ROTHMAN, *supra* note 214, at 142.

vious history of prison labor."²¹⁶ Between one-half and two-thirds of the state's inmate population, he estimated, sat idle.²¹⁷ In the immediate aftermath of the Hawes-Cooper and Ashurst-Summers Acts, one report found only 23% of the nation's state prison population engaged in "productive jobs."²¹⁸ Moreover, idle prisoners generate no profits, and few prisons in the 1930s showed any.²¹⁹ One observer at the time said that the state-use system was "apt to impress one with the idea that the restriction imposed upon work, as found in the Fourth Commandment, was intended to apply to our penal institutions rather than to the Sabbath Day—'in it thou shalt not do any work.'"²²⁰

Observers traced the failure of the state-use system to different sources. Some accused prison officials of "perfunctory, mediocre management"²²¹ and charged state officials with failing to take the steps necessary to ensure efficient production.²²² Moreover, although state agencies were required under mandatory-purchase laws to buy prison-made goods, they usually observed that obligation only in the breach.²²³ The Secretary of the Pennsylvania Prison Society asserted that forcing state agencies to buy prison-made goods was counterproductive: "The unwilling purchaser is a poor patron. Evasion of the [mandatory-purchase] law is a constant occurrence."²²⁴

216. Mohler, *supra* note 17, at 588 (quoting PHILIP KLEIN, PRISON METHODS IN NEW YORK STATE 272 (1920)).

217. *See id.*

218. *See* DEP'T OF JUSTICE, 5 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 53 tbl.5 (1939).

219. *See* ROTHMAN, *supra* note 214, at 138 (noting that only three state systems showed profits during the Depression). The government mobilized prison inmates during the Second World War to help produce goods for the war effort. When the war ended, prisons again went into "slow motion," and "idleness, actual or thinly disguised, [became] the appalling, scandalous common denominator of prison life." Frank T. Flynn, *Employment and Labor*, in CONTEMPORARY CORRECTION 238, 241 (Paul W. Tappan ed., 1951).

220. Beyers, *supra* note 158, at 207.

221. Mohler, *supra* note 17, at 589.

222. *See id.* ("Officialism has prevented the recognition of some of the most evident and obvious methods and devices for rendering the system efficient.")

223. *See, e.g.,* TANNENBAUM, *supra* note 209, at 388 (noting attempts by government agencies in New York to evade such mandatory-purchase laws); New York State Commission of Prisons, *Prison Products Begging for Purchasers in New York*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 137, 137 (1914-1915) ("Many county, city and village officials are ignoring the prison law which requires municipalities to purchase necessary goods and materials manufactured in the prisons . . ."); Flynn, *supra* note 219, at 244 ("Many compulsory-purchase statutes are easily evaded, and others are just as easily ignored."). For more recent observations of the same phenomenon, see, for example, GORDON HAWKINS, THE PRISON: POLICY AND PRACTICE 119 (1976) ("[E]ven state-use markets have, because of political pressure . . . , been largely closed to the products of prison industries."); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 55 (1967) (noting that "[p]olitical pressure brought to bear by private industry and by labor organizations" is "effective" despite compulsory purchase laws).

224. Mohler, *supra* note 17, at 591 (quoting PROCEEDINGS OF THE ANNUAL CONGRESS OF

Writing in 1921, penologist Louis Robinson likened the state-use system to "an experiment in socialism [that] may possibly give us the key to the organization of the socialistic state of the future or arguments against it."²²⁵

Public choice theorists view lawmaking as a process of bargaining between competing interest groups and treat the resulting legislation like a contract.²²⁶ From this perspective, the Hawes-Cooper and Ashurst-Sumners Acts (and similar state laws) represent multiparty agreements between groups anxious to eliminate competition from prison industries, prison wardens anxious to keep inmates occupied, and prison reformers anxious to preserve prison labor as a means of moral regeneration. Yet despite their different objectives nearly everyone agreed that inmates should not remain idle. In 1910, American Federation of Labor leader Samuel Gompers wrote, "Certainly no thoughtful, humane person, and most assuredly no trade unionist, wants the inmates of our prisons to remain idle."²²⁷ One member of Congress captured the general sentiment when he declared that keeping convicts in idleness would constitute a "cruel and unusual punishment."²²⁸ Nonetheless, idleness was the state-use system's primary commodity. If the legislation creating the state-use system was a contract, it appears to have been based on a mutual mistake.

This brief history of prison labor in the United States suggests two important lessons. First, the architects of the penitentiary firmly believed for a variety of reasons that any sensible system of imprisonment must include a system of labor. The earliest designs of the penitentiary reflected this conviction. The decoupling of labor and imprisonment is a departure from this original design. Second, and more importantly, the collapse of prison labor was primarily a matter of politics, not humanitarianism. Concerns for the prisoners played a role, but probably a comparatively small one.

THE AMERICAN PRISON ASSOCIATION 57, 57-58 (1921)). Administrators of today's federal state-use system grant almost all of the waiver requests they receive. See FEDERAL PRISON INDUSTRIES, INC., U.S. DEP'T OF JUSTICE, FEDERAL PRISON INDUSTRIES: 1993 ANNUAL REPORT 5 (1994) [hereinafter FPI ANNUAL REPORT] (reporting that in fiscal year 1992 FPI granted 94.3% of the 9507 requested waivers (representing \$330 million in sales)).

225. LOUIS N. ROBINSON, *PENOLOGY IN THE UNITED STATES: A STUDY OF THE PRISON LABOR PROBLEM IN THE UNITED STATES* 167 (1921).

226. See Frank H. Easterbook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984); cf. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-79 (1975). See generally DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

227. SAMUEL GOMPERS, *LABOR AND THE COMMON WELFARE* 110 (1919); see also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *PRISON LABOR IN THE UNITED STATES* 1932, at 211 (1933) ("No one condones idleness among prisoners because everyone recognizes that its effects are degenerating both morally and physically.") (statement of U.S. Bureau of Prisons Director Sanford Bates); *id.* at 213-16 (collecting similar comments by state prison officials).

228. *Competition of Penal Labor: Hearings Before Subcomm. No. 4 of the House Comm. on Labor*, 60th Cong. 5 (1908) (statement of Texas Rep. James J. Slayden).

These lessons should be kept in mind as we move in Part III to an assessment of the normative defensibility of reopening the market for prison goods and labor. But first an update on the state of prison labor today.

II. PRISON LABOR TODAY

Little has changed.²²⁹ As a rule, the state-use system has forced most of the nation's prisoners into idleness. In 1885, 90% of the prison population worked.²³⁰ In 1997, that figure was only 6.2%.²³¹ In contrast, 27.5% of the federal prison population was employed in prison industries in 1997,²³² which may make the federal state-use system seem like an exception to the rule. However, it's at most an unexceptional exception.

Federal prison labor is organized under the auspices of Federal Prison Industries, Inc. ("FPI"), often referred to by its trade name, "UNICOR."²³³ A nonprofit corporation established in 1934 at the behest of the newly created Federal Bureau of Prisons,²³⁴ FPI is the leviathan of prison industries and has been described as a "model for other jurisdictions."²³⁵ With some ninety-seven different factories in forty-six different locations,²³⁶ FPI consistently employs about a quarter of the federal prison population.²³⁷ In 1993, its net sales exceeded \$400 million.²³⁸ Predictably, labor and business interests—especially small business—regularly lobby Congress to limit FPI's

229. See MICHAEL MUSHLIN, 1 RIGHTS OF PRISONERS § 2.13, at 105 (2d ed. 1993) ("[F]or far too many prisoners, idleness is the order of the day.").

230. See FUNKE ET AL., *supra* note 17, at 20-21 tbl.2-7.

231. See Greg Wees, *Prison Industries 1997*, CORRECTIONS COMPENDIUM, June 1997, at 10, 10. Reported figures are for male inmates.

232. See *id.* Although the "industrial prison" in the United States is gone, it appears to be "flourish[ing]" in Japan. Elmer H. Johnson, *Opposing Outcomes of the Industrial Prison, Japan and the United States Compared*, 4 INT'L CRIM. JUST. REV. 52, 52 (1994); see also Elmer H. Johnson, *Guided Change in Japan: The Correctional Association Prison Industrial Cooperative (CAPIC) and Prison Industry*, in COMPARATIVE & INTERNATIONAL CRIMINAL JUSTICE SYSTEMS: POLICING, JUDICIARY, AND CORRECTIONS 169, 171-72 (Obi N. Ignatius Ebbe ed., 1996) (discussing the Japanese industrial prison).

233. 18 U.S.C. § 4122 (1994).

234. See PAUL KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS 165-66, 239-40 (1991). At the time it was created, FPI even had the support of the AFL and other unions. See *id.* at 166.

235. *Federal Prison Industries and Implementation of the Federal Prison Industries Provisions of the Anti-Drug Abuse Act of 1988: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 67 (1990) ("[FPI] is viewed among state, county and city correctional industries across the nation as an operational model for development.") (statement of American Correctional Association Executive Director Anthony P. Travisono).

236. See FPI ANNUAL REPORT, *supra* note 224, at 3.

237. See Wees, *supra* note 231, at 10.

238. See FPI ANNUAL REPORT, *supra* note 224, at 11 (reporting sales of \$404,945,000 in 1993).

pecially small business—regularly lobby Congress to limit FPI's operations, or at least slow its growth.²³⁹

Nonetheless, much of FPI's apparent success stems from the fact that its labor force (the federal prison population) is relatively small whereas its market (the federal government) is relatively large. Despite its absolute size, FPI sales to the federal government still represent less than 2% of all federal procurements,²⁴⁰ and three-quarters of the federal prison population remains without work.²⁴¹ Moreover, unless FPI can find politically viable ways to expand production, this unemployment rate will increase as the size of the federal prison population grows.²⁴² Finally, to keep FPI's success in economic perspective, bear in mind that the incarceration costs of FPI's inmate workforce totaled almost \$200 million in 1993.²⁴³

Within state prisons, the state-use system continues to reign supreme.²⁴⁴ However, signs of change have begun to appear. Starting in the late 1970s, the contract system looked like it might stage a comeback. Enacted in 1979, the Prison Industry Enhancement Act ("PIE")²⁴⁵ permits private firms to em-

239. See generally *Federal Prison Industries: A Growing Threat to Small Business: Hearings Before the Subcomm. on Gov't Contracting and Paperwork Reduction of the Senate Comm. on Small Bus.*, 101st Cong. *passim* (1990) (exemplifying efforts to encourage further regulation of FPI); Doug Abrahms, *Jobs Escape to Prisons: Inmate Labor Competes with Firms*, WASH. TIMES, Aug. 14, 1994, at A12 (noting private sector complaints against unfair competition from FPI); Naftali Bendavid, *Are Prison Industries on Death Row?*, LEGAL TIMES, Sept. 30, 1996, at 1 (describing recent efforts to eliminate FPI's mandatory preferential treatment in government contracting).

240. See *Federal Prison Industries, Inc.—UNICOR: Hearing Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 103d Cong. 32 (1993) [hereinafter *Hearing, FPI-UNICOR*] (statement of FPI Chief Operating Officer Richard P. Seiter). This figure includes purchases by the Department of Defense, which is FPI's largest buyer. See *id.*; see also *Department of Defense Purchases from the Federal Prison Industries: Hearings Before the Subcomm. on Readiness, Sustainability and Support of the Senate Comm. on Armed Services*, 102d Cong. 4 (1991) (observing that the Department of Defense "purchases about two-thirds of UNICOR's total production") (statement of Derek J. Vander Schaaf, Deputy Inspector General, Department of Defense).

241. This percentage has remained relatively stable since at least 1983. See *Hearing, FPI-UNICOR*, *supra* note 240, at 31.

242. See *id.* at 31-32.

243. This figure was calculated as follows: In 1993, FPI employed 13,794 inmates. See FPI ANNUAL REPORT, *supra* note 224, at 11. In 1990, the annual operating expenditure per inmate in the federal prison system was \$14,456. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 13 tbl.1.9 (1994) [hereinafter 1993 SOURCEBOOK]. Multiplying the two figures yields a total of \$199,406,064.

244. See, e.g., Morris, *supra* note 3, at 246.

245. Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 827, 93 Stat. 1167, 1215 (codified as amended at 18 U.S.C. § 1761 (1994)). The Act is also known as the "Percy Amendment" after its sponsor, Illinois Senator Charles Percy. For a recent overview and evaluation of the PIE program, see James J. Misrahi, Note, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective*, 33 AM. CRIM. L. REV. 411 (1996).

A precursor to the PIE program known as the "free venture" model was established in 1976

ploy prison labor under certain circumstances. It also allows certified firms to sell prison-made goods on the open market free from the existing federal ban on the interstate sale of such goods. To participate in the PIE program a firm must pay prisoners "wages . . . which [are] not less than th[ose] paid for work of a similar nature in the locality in which the work is performed,"²⁴⁶ i.e., the prevailing wage rate, and must demonstrate that inmates will not displace free labor.²⁴⁷ It must also make specified deductions from an inmate's wages.²⁴⁸ These deductions, which can total up to 80% of the inmate's gross wage,²⁴⁹ can be used for "room and board," federal and state taxes, family support, and contributions to victim compensation funds.²⁵⁰ The inmate gets what's left over.

As of June 1995, the PIE program had certified thirty-six jurisdictions (up to fifty are authorized).²⁵¹ Altogether, the PIE program employs more than 1600 offenders.²⁵² Prisoners working in PIE industries produce a wide variety of goods, including micrographics, textiles, children's clothing, toys, hotel amenities, waterbeds, restored antique autos, fishing lures, golf balls, and snowshoes.²⁵³ They also provide services such as telemarketing and data entry.²⁵⁴ Prisoners at the California Youth and Adult Correctional Agency book flights for TWA,²⁵⁵ whereas prisoners at the Arizona Center for Women take reservations for Best Western.²⁵⁶ Washington inmates package

under the auspices of the Law Enforcement Assistance Administration ("LEAA"). Funding for the program was discontinued in 1980 when the LEAA itself was abolished. *See FUNKE ET AL.*, *supra* note 17, at 35-36 (describing free venture model).

246. 18 U.S.C. § 1761(c)(1). Under final guidelines issued by the Department of Justice, "[a]pplicants must [also] provide for inmate worker entitlement to benefits and compensation as a result of injuries sustained in the course of employment related to project certification." Private Sector/Prison Industry Enhancement Certification Program, 50 Fed. Reg. 12,661, 12,663 (1985). Inmate wages in non-PIE industries averaged anywhere from 27 cents to \$1.05 an hour as of January 1, 1997. *See CAMILLE GRAHAM CAMP & GEORGE M. CAMP, THE CORRECTIONS YEARBOOK 1996*, at 88 (1996).

247. *See* Private Sector/Prison Industry Enhancement Certification Program, 50 Fed. Reg. at 12,663.

248. *See* 18 U.S.C. § 1761(c)(1)(A)-(D).

249. *See id.* § 1761(c)(1).

250. *See id.* § 1761(c)(1)(A)-(D).

251. *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, FACT SHEET: PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM 1, 3 (1995) [hereinafter *ENHANCEMENT CERTIFICATION PROGRAM*].

252. *See* Robert J. Verdeyen, *Correctional Industries: Making Inmate Work Productive*, *CORRECTIONS TODAY*, Aug. 1995, at 106, 110.

253. *See* CORRECTIONAL INDUSTRIES ASSOCIATION, INC., 1996 DIRECTORY: PRODUCING PRODUCTIVE PEOPLE *passim* (1996).

254. *See* GEORGE E. SEXTON, WORK IN AMERICAN PRISONS: JOINT VENTURES WITH THE PRIVATE SECTOR 3 (1995).

255. *See* Vince Beiser, *Look for the Prison Label: America Puts Its Inmates to Work*, *VILLAGE VOICE*, May 21, 1996, at 37.

256. *See* Gordon M. Henry, *Inside Job*, *TIME*, May 12, 1986, at 78.

software for Microsoft,²⁵⁷ and South Carolina inmates sew graduation gowns for Jostens.²⁵⁸ Perhaps best known are the inmates at the Eastern Oregon Correctional Institute, who make "Prison Blues," designer jeans "made on the inside to be worn on the outside."²⁵⁹ The jeans are sold to some 450 stores nationwide, as well as to retailers in seventeen states and five countries.²⁶⁰

Like FPI, the PIE program looks like an exception to the general failure of prison industry. Between December 1979 and mid-June 1995, inmate gross earnings exceeded \$44 million.²⁶¹ Of this, \$3.6 million went to victims' programs, \$10.5 million was spent to defray the costs of incarceration, \$3.4 million went toward family support payments, and \$6.1 million was withheld for taxes, for a total of \$23.6 million.²⁶² Do these numbers demonstrate that the PIE program is an economic success? Moreover, if groups who suffer from competition with prison industries have more political clout than the beneficiaries of prison labor, does the creation of the PIE program defy the laws of interest-group politics?

Not really. The trick behind the PIE program is that it exchanges one debilitating limit on prison labor for another. The Hawes-Cooper and Ashurst-Sumners Acts smothered prison industries in one way; the PIE program keeps them smothered in another. The PIE program requires inmates to receive the same wages "paid for work of a similar nature in the locality in which the work [is] performed."²⁶³ However, given the additional costs of doing business inside prison (e.g., additional security costs), few industries will find it worthwhile to set up shop behind prison walls if they are forced to pay inmates the prevailing wage—unless, of course, the state offers a subsidy to offset these higher costs. If few firms have an incentive to invest in prison industries, it doesn't matter whether prison-made goods can be sold on the open market, since few goods will ever be produced. Indeed, a prevailing wage requirement was one of the measures that "sincere friends of labor"²⁶⁴ urged in the 1880s as a way to restrict prison labor.²⁶⁵

257. See Beiser, *supra* note 255, at 37.

258. See SEXTON, *supra* note 254, at 7-8.

259. Beiser, *supra* note 255, at 38. See generally Brad Haga, *Prison Blues: Jeans Change Public Perceptions, Offer Innovative Solutions*, CORRECTIONS COMPENDIUM, Oct. 1994, at 1 (describing origins and operation of "Prison Blues").

260. See Haga, *supra* note 259, at 4.

261. See Verdeyen, *supra* note 252, at 109.

262. See ENHANCEMENT CERTIFICATION PROGRAM, *supra* note 251, at 2.

263. 18 U.S.C. § 1761(c)(1) (1994).

264. 1886 ANNUAL REPORT, *supra* note 151, at 387.

265. Unions continue to support the minimum wage for prison inmates. For example, in response to a handful of court decisions extending the minimum wage protections of the Fair Labor Standards Act ("FLSA") to state prisoners, legislation was introduced in Congress making it clear that inmates were not covered by the FLSA's minimum wage provisions. Union representatives opposed this legislation. According to one AFL-CIO spokesman, "[I]t is wrong for State-owned

As a result, it should come as no surprise that the PIE program is still only a blip on the screen of prison labor. Although they appear to be growing, PIE industries now employ only 0.18% of the total state prison population.²⁶⁶ Nor should it be surprising that, according to some union officials, existing PIE industries have in fact quietly circumvented the "prevailing wage" requirement.²⁶⁷ Finally, it should hardly be surprising that the PIE program survived the legislative process. The economic threat it presents to the natural enemies of prison labor is really very limited.

If a genuine system of prison labor is the aim, then the PIE program is not the way to go. The following part suggests a defensible alternative.

III. REOPENING THE MARKET

Despite their differences, all who participated in the struggle over prison labor at the turn of the century shared the belief that prisoners should work. Although eclipsed for a time by the rehabilitative ideal, that conviction is again taking hold. A former Chief Justice of the United States,²⁶⁸ presidential candidates,²⁶⁹ and the American Bar Association²⁷⁰ have all voiced sup-

prisons to create or support businesses paying convicts substandard wages to take jobs from free workers who have committed no crime." *Implications of the Fair Labor Standards Act for Inmates, Correctional Inst., Private Industries, and Labor: Hearings on S. 115 Before the Senate Comm. on Labor and Human Resources*, 103d Cong. 32 (1994) [hereinafter *Hearings, Fair Labor Implications*] (statement of John L. Zalusky, Office of Wages and Industrial Relations, AFL-CIO).

The courts have more recently begun to hold that the FLSA does not apply to state inmates. See *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters.*, 112 F.3d 1119 (11th Cir. 1997); accord *Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996), modifying *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984); *Reimonenq v. Foti*, 72 F.3d 472 (5th Cir. 1996); *McMaster v. Minnesota*, 30 F.3d 976 (8th Cir. 1994). For an analysis of this issue, see James K. Haslam, Comment, *Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage?*, 1994 BYU L. REV. 369, 387-96 (arguing that FLSA coverage for inmates would undermine public policy regarding incarceration of criminal offenders), and Alexander B. Wellen, Comment, *Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage?*, 67 TEM. L. REV. 295, 297-308 (1994) (arguing that prisoners are not "employees" under FLSA).

266. This figure represents the total number of inmates employed under the PIE program as of June 1995 as a percentage of the total prison population in 1995. PIE inmates in 1995 numbered 1,600. See Verdeyen, *supra* note 252, at 110. Total state prisoners in 1995 numbered 896,455. See 1995 SOURCEBOOK, *supra* note 26, at 553 tbl.6.20.

267. According to one union official, companies not only pay convict labor wages below market rates, but also fail to pay for overtime, vacations, retirement, and other benefits enjoyed by free labor. See *Hearings, Fair Labor Implications*, *supra* note 265, at 34 (statement of John L. Zalusky, Office of Wages and Industrial Relations, AFL-CIO).

268. See Warren E. Burger, *The High Cost of Prison Tuition*, 40 U. MIAMI L. REV. 903 (1986); William Raspberry, Editorial, *Burger's Prison Dream*, WASH. POST, June 28, 1995, at A21.

269. See *Gramm Launches California Campaign Trip*, SACRAMENTO BEE, Oct. 22, 1995, at A3; Thomas Hardy, *Jails Must Get Tough, Dole Says: GOP Hopeful Vows Return to Discipline*, CHI. TRIB., Sept. 18, 1996, at 19.

270. See STANDARDS FOR CRIMINAL JUSTICE Standard 23-4.4(a) (1985) ("Correctional authorities should be empowered to contract with private enterprises for the establishment and op-

port for some form of prison labor. Contemporary defenders of retribution and of rehabilitation, who generally see few things eye-to-eye, look upon prison labor with favor,²⁷¹ and opinion polls show backing for prison labor among the general public.²⁷²

This part proceeds in two sections. The first section addresses the normative question: Is an open market for prison goods and labor morally desirable, or at least morally defensible, especially in light of its checkered history? The second section addresses the political question: Is an open market for prison goods and labor politically possible? The answer to the first question is "yes." The answer to the second is "maybe."

For present purposes, an "open market" for prison goods and labor means allowing prisoners to sell their labor to private firms and allowing private firms to sell prison-made goods without restriction. An open market for prison goods and labor therefore envisions repealing state and federal statutes eliminating access to those markets and returning to some form of either the contract system or the lease system.

Both these systems offer inmate labor and the goods that labor produces for sale on the open market. Likewise, both systems place control over production in the hands of private firms. However, the lease system goes one step further and establishes private control over inmate custody, care, and discipline. This step is unnecessary. The history of the lease system suggests that uniting control over both production and custody creates too great

eration of industrial and service facilities.").

271. See, e.g., Francis T. Cullen & Lawrence F. Travis III, *Work As an Avenue of Prison Reform*, 10 NEW ENG. J. CRIM. & CIV. CONFINEMENT 45, 64 (1984) (concluding that work "holds the potential of humanizing the lives of some offenders at a time when repression rather than benevolence is the official state penal policy"); Ernest van den Haag, Comment, *Rights and Obligations of Prisoners*, 11 NEW ENG. J. CRIM. & CIV. CONFINEMENT 1, 2-3 (1985) (endorsing prison labor); see also Andrew Peyton Thomas, *Outdated Laws Shackle Prison Reform*, WALL ST. J., Mar. 30, 1995, at A14 (calling for a restoration of prison labor).

However, those who emphasize rehabilitation typically argue that prisoners should be paid the minimum or prevailing wage. See Cullen & Travis, *supra*, at 57 ("The kind of reform being suggested here, however, would stipulate that offenders be paid minimum wage at the very least if not compensation equal to that of workers on the outside."); Josephine R. Potuto, *The Modern Prison: Let's Make It a Factory for Change*, 18 U. TOL. L. REV. 51, 61 (1986) [hereinafter Potuto, *Modern Prison*] (advocating the payment of a prevailing wage); Josephine R. Potuto, *An Operational Plan for Realistic Prison Employment*, 1980 WIS. L. REV. 291, 318-21 (arguing for the payment of a "competitive wage").

272. See 1995 SOURCEBOOK, *supra* note 26, at 180 tbl.2.66 (reporting results of 1995 poll in which 79.4% of respondents thought it would be a "good idea" if prisoners were paid for their work but were required to return two-thirds of that amount to their victims as restitution or to the state as reimbursement for the costs of incarceration); see also William J. Bowers, Margaret Vandiver & Patricia H. Dugan, *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 144 (1994) (reporting that support for the death penalty drops when alternative sanctions include imprisonment combined with the requirement that defendants work to pay restitution).

a temptation for inmate abuse.²⁷³ The history of the contract system suggests that a viable system of prison labor can be established without divesting the state of its responsibility for the well-being of its prisoners.²⁷⁴ Accordingly, the proposal advanced here is for a return to the contract system. Private firms should be able to hire prisoners and to offer inmate-produced goods for sale on the open market. But they should not be responsible for the inmates' custody, care, and discipline. That responsibility should remain with the state.

This open-market model is similar to the PIE model, with three important differences. First, the open-market model contemplates no limit on the number of inmates eligible for work. The market for prison labor would extend to all state and federal prisons and would include all inmates willing and able to work. Second, firms willing to establish prison industries would not be required to pay inmates the minimum or prevailing wage, as they must under the PIE program. Instead, the market would set the prevailing inmate wage, which would likely come to rest at some point below the minimum wage.²⁷⁵ Third, inmates would be entitled to keep their earnings free from any deduction or tax.²⁷⁶

A. *The Morality of the Market*

The normative case for the contract system is broadly utilitarian. Re-opening the market promises to produce a set of identifiable benefits that the risks are unlikely to outweigh. This analysis assumes that the available options are limited to an open market and the status quo. It does not ask how a contract regime of prison labor would compare, for example, to a prison regime in which educational, vocational, or therapeutic programs occupy the place of work.

The potential benefits of an open market are threefold: increased social welfare, improved order within the prison, and enhanced prospects for inmate reform and rehabilitation.

1. *Potential Benefits.*

Social welfare. Imagine a foreign country that has a regular pattern of migration in and out and a population whose basic needs must be satisfied. Its rate of immigration is greater than the rate of emigration, and the size of

273. See notes 179-205 *supra* and accompanying text.

274. See notes 142-178 *supra* and accompanying text.

275. The prison wage rate may come closer to the minimum wage if firms employing prison workers are not required to provide typical employee benefits (e.g., pensions, insurance, and social security). In 1990, employee benefits constituted 37.9% of wages and salaries for free labor. See STEVEN L. WILLBORN, STEWART J. SCHWAB & JOHN F. BURTON, JR., *EMPLOYMENT LAW: CASES AND MATERIALS* 587 tbl.15-1 (1993).

276. This feature of the open-market model will probably need to be abandoned in order to make an open market politically viable. See notes 356-358 *infra* and accompanying text.

its population is therefore steadily growing. It has an authoritarian form of government, and its citizens have little say in how things are run. It has few skilled workers, but it does have a ready supply of unskilled labor. It has almost no indigenous industries and produces almost nothing. Instead, its population survives on massive subsidies from foreign aid. This country looks much like today's prisons.

If we consider the modern prison from this perspective, the existing restrictions on the "importation" of prison goods and labor are a form of protectionist legislation. They protect certain "domestic" workers and industries from "foreign" competition. As with any protectionist legislation, these restrictions on free trade benefit some domestic workers and industries, but they benefit those workers and industries at the expense of overall social welfare.²⁷⁷ Conversely, if those restrictions are lifted and free trade is allowed to take place, then the welfare of both countries will improve.²⁷⁸

By analogy, lifting the restrictions on free trade with the prison will improve the welfare of both the prison population and the population of its "free world" trading partner. Of course, in reality the prison is not a foreign country, nor are its inmates actors in a free-market economy. The analogy is inexact, but nonetheless instructive. Indeed, proponents of prison labor claim that "[c]ompanies are attracted to working with prisons because inmates represent a readily available and dependable source of entry-level labor that is a cost effective alternative to workforces found in Mexico, the Caribbean Basin, Southeast Asia, and the Pacific Rim countries."²⁷⁹

Some economists insist that prison industries make little economic sense. They caution that prisoners as a whole have little skill, thus making them an unattractive source of labor.²⁸⁰ In addition, they note that pecuniary incentives tend to work poorly in prisons because the state is constitutionally obligated to provide for an inmate's basic needs and because the prison environment itself dramatically limits an inmate's consumption possibilities.²⁸¹

277. As one free trade advocate put it: "Protectionism means robbing Peter to pay Paul or, more accurately, robbing a thousand Peters to pay one Paul." James Bovard, *The Morality of Protectionism*, 25 N.Y.U. J. INT'L L. & POL. 235, 239 (1993).

278. These claims are admittedly gross over-simplifications. For a more fully developed argument in favor of free trade in the international arena, see PAUL R. KRUGMAN & MAURICE OBSITFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 228-36 (3d ed. 1994); see also Jagdish N. Bhagwati, *Challenges to the Doctrine of Free Trade*, 25 N.Y.U. J. INT'L L. & POL. 219, 220 (1993) ("[E]conomists must . . . argue afresh that the old case for free trade survives intellectually" despite "new challenges[.]").

279. SEXTON, *supra* note 254, at 3; see also ANDREW PEYTON THOMAS, *CRIME AND THE SACKING OF AMERICA: THE ROOTS OF CHAOS* 121 (1994) ("Prison labor would make available a pool of low-wage workers to the American capital that today is being sent to foreign markets.").

280. See Denton Marks & Aidan Vining, *Prison Labor Markets: The Supply Issue*, 19 POL'Y SCI. 83, 88-93 (1986) (describing characteristics of prisoners that tend to make them poor workers).

281. See *id.* at 93 (suggesting that prisoners' economic security and limited consumption possibilities are disincentives to work); see also FUNKE ET AL., *supra* note 17, at 128-29 (summarizing problems with implementing "free-market-like wage-incentive plans"); Neil M. Singer, *Incentives*

Although these claims are probably valid, they fail to justify the existing embargo against the prison. The decision to hire prison workers should be left to the judgment of individual firms, and the decision to work should be left to the judgment of individual inmates.²⁸²

Admittedly, free trade with the prison would not be cost free. Overall social welfare would improve, but the benefits of free trade would not be evenly distributed. Some groups would be worse off under free trade. Workers employed in industries that move "overseas" and into the prison would lose their jobs, as would workers employed by firms unable to compete with newly created prison industries. The impact would be most severe in those sectors of the market in which prison industries concentrate. Still, the overall number of free workers who would lose their jobs to prisoners would probably be relatively small.²⁸³ If 80% of the nation's prison population were suddenly to start working for private firms, they would still represent only a small portion of the total civilian labor force over age sixteen.²⁸⁴

Prison order. Prison labor has long been seen as a way to provide inmates with a respite from solitude, to forestall idleness, and to preserve peace and order behind prison walls.²⁸⁵ Although it's unlikely that the penitentiary will ever be a factory of virtue, neither should it decay into a seminary of vice. Indeed, insofar as imprisonment is meant to entail a deprivation of liberty and nothing more, the state's first obligation should be to maintain order

and the Use of Prison Labor, 19 CRIME & DELINQ. 200, 206 (1973) (observing that the "development of prison factories generally will occur under constraints that prevent the attainment of the efficient mix of factors [of production]" and urging expanded use of work-release). For an earlier discussion of the problem of providing work incentives as the use of older, more coercive methods was declining, see Charles S. Hyneman, *The Problem of Providing Incentive for Prison Labor*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY 603 (1927).

282. Whether an inmate will choose to work depends in part on what he can do during his "leisure" time, which partly depends on the privileges available to him. Prison authorities could create an incentive for inmates to work by removing inmate privileges. Although prison authorities have broad discretion to provide or withdraw inmate privileges, the Eighth Amendment establishes a constitutional floor beneath which conditions inside the prison cannot drop. See *Helling v. McKinney*, 509 U.S. 25, 31 (1993) ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.").

283. See Timothy J. Flanagan & Kathleen Maguire, *A Full Employment Policy for Prisons in the United States: Some Arguments, Estimates, and Implications*, 21 J. CRIM. JUST. 117, 125 (1993) (arguing that even large-scale prisoner employment would have a small effect on the economy as a whole).

284. This percentage is based on figures from the Bureau of Justice Statistics and the Bureau of Labor Statistics, which indicate a total of 1,126,293 incarcerated prisoners on December 31, 1995, see CHRISTOPHER J. MUMOLA & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 1996, at 1, 2 tbl.2 (1997) [hereinafter PRISONERS IN 1996], and a monthly average of 124,900,000 persons in the labor force during 1995, see U.S. DEP'T OF COMM., STATISTICAL ABSTRACT OF THE U.S. 1996, at 393 tbl.614 (116th ed., 1996).

285. See Cullen & Travis, *supra* note 271, at 63 ("[P]rison equilibrium is bolstered by the availability of opportunities that will give inmates some reason to conform.").

inside the prison. Wrongdoers "are sent to prison *as* a punishment and not *for* punishment."²⁸⁶

Evidence on the relationship between inmate idleness and prison disorder comes from a variety of sources. One is prison wardens who have long dreaded the consequences of idleness. Responding in 1834 to an official inquiry, the director of the French prison at Clairvaux explained:

I am profoundly convinced that the hope of reforming criminals, that is, of making honest men of them, is a chimera. I do not know how to concede that work exercises an essentially reforming effect on them. But I do consider work in any large prison to be the surest guarantee of order, peace, and quiet.²⁸⁷

Recall also that wardens in this country were among the contract system's staunchest defenders, in part because they worried about how to run their institutions without work.²⁸⁸ According to recent testimony by the president of the federal prison guard union, federal prisons would be "unmanageable"²⁸⁹ without FPI.

Nonetheless, idleness remains the common denominator of life in most state correctional facilities. In 1990, only 6.9% of all state inmates were engaged in full-time work projects,²⁹⁰ and only 20.9% were enrolled in some form of academic program, whether adult basic education, secondary, or college.²⁹¹ Moreover, much to the dismay of prison wardens,²⁹² many states have started removing prison privileges, everything from weights and cable televisions to Pell Grants.²⁹³ Existing ways to reduce inmate idleness are shrinking.

286. SIR WALTER MOBERLY, *THE ETHICS OF PUNISHMENT* 260 (1968) (commenting on the philosophy of Sir Alexander Paterson).

287. PATRICIA O'BRIEN, *THE PROMISE OF PUNISHMENT: PRISONS IN NINETEENTH-CENTURY FRANCE 183-84* (1982) (emphasis omitted).

288. See notes 159-160 *supra* and accompanying text.

289. *Hearing, FPI-UNICOR*, *supra* note 240, at 94 (statement of Michael Grotefend, President, Council of Prison Locals, American Federation of Government Employees (AFL-CIO)).

290. See 1993 SOURCEBOOK, *supra* note 243, at 634 tbl.6.71. Although another 53% of the state inmate population work in "facility support services," these jobs are typically not full time. See Potuto, *Modern Prison*, *supra* note 271, at 59.

291. See 1993 SOURCEBOOK, *supra* note 243, at 634 tbl. 6.71.

292. See Peter Finn, *No-Frills Prisons and Jails: A Movement in Flux*, 60 FED. PROBATION 35, 42 (1996) ("[A]lmost all the corrections experts and managers agreed that eliminating privileges that increase inmate idleness will increase management problems."); W. Wesley Johnson, Katherine Bennett & Timothy J. Flanagan, *Getting Tough on Prisoners: Results from the National Corrections Executive Survey, 1995*, 43 CRIME & DELINQ. 24, 32 (1997) (summarizing which inmate privileges state prison wardens do and do not support reducing or eliminating).

293. According to one survey, 42% of respondents from corrections departments nationwide said that inmates had fewer privileges than they did 10 years ago, 30% said privileges were basically the same, and 28% said they had increased. See Amanda Wunders, *The Extinction of Inmate Privileges*, CORRECTIONS COMPENDIUM, June 1995, at 5, 5; see also Mark Curriden, *Hard Time: Chain Gangs Are in and Exercise Rooms Are out in the Prisons of the '90s*, A.B.A. J., July 1995, at 72 (enumerating several state programs to reduce prison privileges); Johnson et al., *supra* note 292, at 33 (providing table of "Program Reductions or Eliminations Reported by Wardens During 1995);

Although relatively few in number, empirical studies on the relationship between prison labor and prison order suggest a positive relationship. For example, Timothy Flanagan and Kathleen McGuire point to four separate studies purporting to show that participants in prison work programs had lower rates of misconduct than nonparticipants.²⁹⁴ Similarly, a recent study of over 7000 federal prisoners found that inmates engaged in prison labor were slightly less likely to have a misconduct report within the previous year,²⁹⁵ and that the reports filed against working inmates were slightly less likely to have been for serious misconduct.²⁹⁶ The absolute differences were small, but they are nonetheless significant, especially in light of the problems that serious misconduct creates for prison administrators.

Along the same lines, those who study the causes of prison riots commonly mention inmate idleness in their diagnosis, at least insofar as idleness is associated with an increased sense of disorder within the prison. A study of the 1980 riot at the Penitentiary of New Mexico concluded that changes in prison conditions were "definitely tied" to a "shift from order to disorder" observed in the prison prior to the riot, and that "probably the most important [change leading to this shift] was the dramatic drop after 1975 in inmate programs dealing with educational, occupational, and social skills."²⁹⁷ Similarly, John DiIulio has argued that the "control model" of corrections, which emphasizes "inmate obedience, work, and education, roughly in that order,"²⁹⁸ enabled Texas prisons to remain free of gangs at a time when state

Dirk Johnson, *Taking Away The Privileges of Prisoners*, N.Y. TIMES, Sept. 8, 1996, at A24 (detailing a nationwide trend toward fewer prison privileges); James S. Kunen, *Teaching Prisoners a Lesson*, NEW YORKER, July 10, 1995, at 34, 36 (criticizing the termination of a New York prison education program); *Update: The Loss of Pell Grants*, CORRECTIONS COMPENDIUM, Sept. 1997, at 5, 5 ("[L]oss of inmate eligibility for Pell Grants . . . continues to impact those who would benefit from taking college classes, earning credits or degrees.").

294. See Flanagan & Maguire, *supra* note 283, at 118 & n.4.

295. See William G. Saylor & Gerald G. Gaes, *Training Inmates Through Industrial Work Participation and Vocational and Apprenticeship Instruction*, 1 CORRECTIONS MGMT. Q. 32, 39 (1997) (noting that "22.2 percent of study group participants and 26.2 percent of comparison group inmates received an incident report within the last year of commitment").

The authors of the study are affiliated with the Office of Research and Evaluation of the Bureau of Prisons, but the opinions they express "do not represent the official position of the U.S. Bureau of Prisons or the U.S. Department of Justice." *Id.* at 32.

296. See *id.* at 39 (finding 1.6% of study group participants and 2.6% of comparison group participants received an incident report for serious misconduct).

297. MARK COLVIN, *THE PENITENTIARY IN CRISIS: FROM ACCOMMODATION TO RIOT IN NEW MEXICO* 197 (1992); see also BERT USEEM & PETER KIMBALL, *STATES OF SIEGE: U.S. PRISON RIOTS, 1971-1986*, at 227 (1989) (concluding that "good administration is the key" to prison order and that "good administration" includes the "provision of programming, work, cell space, and the amenities of life, to a reasonably legitimate standard").

298. JOHN J. DI IULIO, JR., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* 105 (1987).

prison systems based on other models, such as California's, were experiencing substantial gang-related problems.²⁹⁹

Inmate reform and rehabilitation. Conceived as a place to do penance, the early penitentiary was built on a regime of silence and labor.³⁰⁰ John Howard, the eighteenth-century "father of the penitentiary" and devout Calvinist,³⁰¹ believed inmate labor was "indispensably requisite."³⁰² For Howard, idleness was a sin, and the idle sinner needed salvation: "Make men diligent, and they will be honest."³⁰³ More recently, criminologist Hans Toch has noted that studies using focus groups find that the public's view of prisons continues to reflect "a secular version of the Puritan ethic that envisages redeemability through [good] works and reassimilation into the community."³⁰⁴

Less religious renderings of Howard's vision replace saving souls with acquiring skills or "habits of industry . . . which will make it easier to hold a job" after release.³⁰⁵ Steady labor and self-support have also been described as bases of individual self-respect.³⁰⁶ Moreover, as a tool for reform, work escapes many of the criticisms leveled against the treatment-centered strategies characteristic of the rehabilitative ideal.³⁰⁷ Unlike drug treatment or electroshock therapy, work is not physically invasive; unlike other forms of psychiatric intervention, it does not define the offender as "sick."

Criminologists today typically look to recidivism rates to measure what Howard would have called "moral reform." Unfortunately, few studies of the relationship between work and recidivism exist, and the results of those that do are mixed. According to one 1987 study that "controll[ed] for *a priori*

299. *See id.* at 108.

300. *See* DE BEAUMONT & DE TOCQUEVILLE, *supra* note 1, at 56 ("The prisons of Auburn, Sing Sing, Wethersfield, Boston, and Philadelphia, rest then upon these two united principles, solitude and labor.").

301. IGNATIEFF, *supra* note 16, at 47, 49-50.

302. JOHN HOWARD, *THE STATE OF PRISONS IN ENGLAND AND WALES* 38 (Bicentennial ed. 1977) (1777).

303. The National Prison Reform Congress attributed this maxim to Howard in its 1870 Declaration of Principles. *See* Beyers, *supra* note 158, at 194.

304. Hans Toch, *Prison Reform in a Federalist Democracy*, 76 PRISON J. 495, 497 (1996).

305. LOUIS N. ROBINSON, *SHOULD PRISONERS WORK?* 298 (1931); *see also* MAX GRÜNHUT, *PENAL REFORM: A COMPARATIVE STUDY* 209 (1948) ("The object of prison labour in a rehabilitative programme is twofold: training for work and training by work.").

306. *See, e.g.,* DIX, *supra* note 163, at 11-12 ("He who works for his maintenance has a higher sense of self-respect, than he who receives his support from others."). It is perhaps no coincidence that Florida's prison industries go by the name P.R.I.D.E. (Prison and Rehabilitative Industries and Diversified Enterprises). *See* Ron Bartlett, *Inmates Building Cars Behind Bars: PRIDE Project Turns Mail Trucks to Sport Utility Vehicles*, TAMPA TRIB., Oct. 18, 1995, at 1.

307. *Cf.* Cullen & Travis, *supra* note 271, at 51 ("[N]ot all dimensions of rehabilitative philosophy were equally tarnished over the past decade. Instead, . . . psychiatric imagery of the criminal and concomitant therapeutic devices suffered the brunt of the criticism . . ."). *See generally* KARL MENNINGER, *THE CRIME OF PUNISHMENT* (1968) (discussing the uses of psychiatry in crime prevention and punishment).

intergroup differences," recidivism rates among working and nonworking prisoners were virtually identical.³⁰⁸ Similarly, another researcher concluded in 1989 that the "few empirical studies that have examined the presumed beneficial effects of prison labor on inmate behavior[, including reduced recidivism rates,] have reached contradictory but largely pessimistic conclusions."³⁰⁹

However, a recent study of the federal prison system suggests that prison work can indeed reduce recidivism. Called "PREP" (for Post-Release Employment Project), the study followed more than 7000 federal offenders over an approximately four-year period between 1983 and 1987.³¹⁰ The study compared participants in UNICOR (FPI) and other work programs with a nonparticipant control group. The two groups were "[t]heoretically . . . equivalent . . . in every respect except for their participation in the work or vocational training program."³¹¹ The study found that UNICOR participants were less likely to recidivate than were nonparticipants in the comparison group.³¹² Participants recidivated within twelve months after release at a rate of 6.6%, whereas nonparticipants recidivated during the same time period at a rate of 10.1%.³¹³ The absolute difference is not large but the relative difference is a statistically significant 35%.³¹⁴ UNICOR participants were also 14% more likely to be employed at any given time during the twelve months following their release than were nonparticipants.³¹⁵ Moreover, according to the study's authors, "inmates who participated in work or job skills programs were less likely to be recommitted to federal prisons" as much as eight to twelve years following their release.³¹⁶

308. Timothy J. Flanagan, *Prison Labor and Industry*, in *THE AMERICAN PRISON: ISSUES IN RESEARCH AND POLICY* 135, 156 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989); see also Merry A. Morash & Etta A. Anderson, *Liberal Thinking on Rehabilitation: A Work-Able Solution to Crime*, 25 SOC. PROBS. 556, 559 (1978) (noting that several studies conducted in the 1970s "conclude that there is little evidence that work related correctional programs decrease recidivism").

309. Flanagan, *supra* note 308, at 156. Note that these studies were examining the effects of work within state-use systems.

310. See Saylor & Gaes, *supra* note 295, at 32.

311. *Id.* at 36.

312. See *id.* at 39-40 (finding that members in the control group "were 35 percent less likely to recidivate" after one year).

313. See *id.* The recidivism rate for a random sample of releases would have been around 20%. See *id.* at 40.

314. See *id.*; see also *Federal Prison Industries, Incorporated: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. 33 (1996) (statement of Morgan O. Reynolds, Ph.D., Director, Criminal Justice Center, National Center for Policy Analysis) (citing a study of participants in Wisconsin's prison industry program that indicated "the recidivism rate after three years was 15 percent lower for those who worked . . . [in prison industries] than for those who did not").

315. After 12 months, 71.7% of UNICOR participants were employed compared to 63.1% of nonparticipants. The difference was statistically significant. See Saylor & Gates, *supra* note 295, at 40.

316. *Id.* at 42. The authors did not examine long-term recommitment rates to state prison.

Most offenders face substantial obstacles in the search for post-release employment.³¹⁷ Even inmates who have exemplary prison work records will probably find themselves facing an inhospitable marketplace. Still, the PREP study suggests that work in prison can do some good.³¹⁸ First, the savings inmates accumulate in prison may help ease their transition into open society. Second, even if the industries likely to be established under a contract system do not teach inmates highly marketable skills, the inmates' experience with steady employment may nonetheless help inculcate the habits of industry.³¹⁹

In any event, labor can be rewarding in more immediate and less tangible ways. A recent study of Mississippi's notorious Parchman Penitentiary—formerly known as Parchman Farm—closes with this striking observation made by an “old-timer” of fifty years who had experienced first-hand “Black Annie, hand-picked cotton, and dawn-to-dusk labor in the fields.”³²⁰ He knew the old Parchman and how the trustees would beat and shoot their charges. The “new Parchman,” a product of the prisoners' rights revolution, was plainly a better place. At the same time, he believed that the new Parchman could still learn something from the old. “What is missing today,” he said, “is ‘the feeling that work counted for something,’ that the farm had a rhythm, ‘awful bad as it was in most camps, that kept us tired and kept us together and made me feel better inside.’”³²¹

2. *Risks.*

The risks associated with the contract system can be grouped under three broad headings: the risk of inmate abuse, coercion, and exploitation; the risk

However, they suggest that “[a]lthough the federal recommitment data certainly underestimate total recommitment activity, there is no theoretical reason to believe that study or comparison subjects would be more or less likely to be recommitted in non-federal jurisdictions.” *Id.* at 40.

317. See Joel Waldfogel, *Does Conviction Have a Persistent Effect on Income and Employment?*, 14 INT'L REV. L. & ECON. 103, 105 (1994) (“[C]onviction appears to have a substantial and lasting effect on income and, especially, employment.”); see also Richard B. Freeman, *Why Do So Many Young American Men Commit Crimes and What Might We Do About It?*, 10 J. ECON. PERSP. 25, 27 (1996) (“When prisoners complete their sentences, a large number do not return to society rehabilitated to enter the job market.”); Kathleen E. Maguire, Timothy J. Flanagan & Terence P. Thornberry, *Prison Labor and Recidivism*, 4 J. QUANTITATIVE CRIMINOLOGY 3, 16 (1988) (questioning whether “the most brilliantly organized prison industry program . . . can ever be sufficient to overcome the barriers to legitimate employment faced by ex-offenders”).

318. See notes 310-316 *supra* and accompanying text.

319. Cf. DANIEL GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 259 (1964) (concluding based on a variety of data available in 1964 that “[n]ot training in vocational skills, but rather, habituation of inmates to regularity in constructive and rewarding employment . . . are—at present—the major contributions of work in prison to inmate rehabilitation”).

320. OSHINSKY, *supra* note 112, at 255. “Black Annie” was a “leather strap, three feet long and six inches wide,” used to inflict corporal punishment. *Id.* at 149.

321. *Id.* at 255.

of racial stereotyping; and the risk of actually making prison life better than life outside prison, thus violating the so-called principle of less eligibility.

Abuse, coercion, and exploitation. Pressure from organized labor and industry led to the fall of the contract system. Yet what sealed its fate was the loss of support among influential prison reformers who came to believe the system encouraged abuses that undermined the goal of moral reform.³²² Returning to the contract system may reproduce these abuses, but reason exists to think otherwise. Although history should urge caution, many changes since the contract system's heyday make abuse less likely.

The abuses of the old contract system arose at a time when in the law's eyes the prisoner was a "slave of the State."³²³ Moreover, the so-called "hands-off" doctrine allowed the states to run their prisons largely free from judicial supervision.³²⁴ Beginning in the 1960s, however, the courts began to relax the "hands-off" doctrine, thus helping initiate the "prisoners' rights revolution"³²⁵ that pulled aside the "iron curtain drawn between the Constitution and the [nation's] prisons . . ."³²⁶ Like state school systems following *Brown v. Board of Education*,³²⁷ state prison systems across the country came under structural injunctions and the scrutiny of federal district courts.³²⁸

Although more recent developments suggest that the prisoners' rights revolution is at an end,³²⁹ the prisoner has not reverted to his former slave

322. See notes 161-165 *supra* and accompanying text.

323. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

324. See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506 (1963) ("[T]he 'hands-off doctrine' . . . states that 'courts are without power to supervise prison administration or to interface with the ordinary prison rules or regulations.'") (citing *Banning v. Looney*, 213 F.2d 771, 771 (10th Cir. 1954) (*per curiam*)).

325. MUSHLIN, *supra* note 229, § 1.03, at 9-11.

326. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

327. 347 U.S. 483 (1954).

328. Prison labor was an issue in the prisoners' rights revolution. At the time, prison labor was seen as valuable not so much because it was a method of moral reform, but because it was a "right" of the inmate. Some inmate advocates argued that the distinction between prison and free labor rested on a nest of "irrationalities, contradictory policies, and unenlightened assumptions," Leroy D. Clark & Gwendolyn M. Parker, *The Labor Law Problems of the Prisoner*, 28 RUTGERS L. REV. 840, 859 (1975), and that prison labor was entitled to the same rights and privileges as free labor. On this view, inmates were entitled to sue in tort for work-related injuries, or receive workers compensation, to be paid the minimum wage, to enjoy rights of seniority and job security, to receive a pension, and, indeed, to organize and collectively bargain. See *id.* at 846-59; see also Paul Comeau, Comment, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for Organization of Inmate Labor*, 21 BUFF. L. REV. 963, 964 (1972) ("Inmates may have a constitutionally protected right to participate in some form of labor organization . . ."); James J. Maiwurm & Wendy S. Maiwurm, Note, *Minimum Wages for Prisoners: Legal Obstacles and Suggested Reforms*, 7 U. MICH. J.L. REFORM 193, 209-21 (1973) (arguing that prison workers have statutory, common law, and constitutional claims to minimum wage).

329. For a discussion of recent doctrinal trends relating to prisoners' rights, see, for example, Rolando V. Del Carmen, Katherine Bennett & Jeffrey D. Dailey, *State-Created Liberty Interest in Prisons: What the Court Giveth, The Court Also Taketh Away*, 76 PRISON J. 348 (1996), and Melvin

status. Eighth Amendment protections for inmates may be weaker than they once were, but courts today still do not tolerate the physical abuse of inmates.³³⁰ Inmates working within a new contract system who violate prison rules in the course of their employment would remain subject to the disciplinary sanctions commonly used to secure compliance with those rules, e.g., denial of good time credit and various privileges.³³¹ But the courts would not countenance a return to kinds of corporal punishments once used to force inmates to work.

In addition to judicial oversight, economics would also mitigate the risk of abuse in two ways. The first relates to the kind of work inmates can be expected to perform under a contract system. Economists distinguish between "care-intensive" and "effort-intensive" work.³³² Care-intensive work, such as sewing blue jeans, requires some attention to detail. In contrast, effort-intensive work, such as building roads, is a matter of brute strength and physical exertion. Compared to effort-intensive work, greater output can typically be induced in care-intensive work by offering positive incentives rather than by threatening or inflicting physical punishment.³³³ If so, and if the kind of work inmates do under a contract system is care-intensive, then firms should find that wage incentives can more effectively motivate inmates to work than can physical punishment.

Guterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373 (1995). The recently enacted Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-809, 110 Stat. 1321 (1996), will also make it more difficult for inmates to successfully press their grievances in the federal courts. For an overview of the Act and litigation surrounding it, see Katherine Bennett & Rolando V. Del Carmen, *A Review and Analysis of Prison Litigation Reform Act Decisions: Solution or Aggravation?*, 77 PRISON J. 405 (1997), and Kristin L. Burns, Note, *Return to Hard Time: The Prison Litigation Reform Act of 1995*, 31 GA. L. REV. 879, 891-925 (1997).

330. See *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (holding that prison officials are liable for damages if they use force "maliciously and sadistically to cause harm"); see also Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 699 (1993) ("Analysis of Supreme Court and lower court decisions and discussions with judges and advocates suggests that . . . litigation challenging the adequacy of 'the minimal civilized measure of life's necessities' in corrections institutions will continue to be successfully prosecuted." (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981))); cf. Adam Nossiter, *Judge Rules Against Alabama's Prison "Hitching Posts"*, N.Y. TIMES, Jan. 31, 1997, at A10 (discussing recent case in which a federal magistrate declared that Alabama's practice of handcuffing inmates to a "hitching post" for refusing or failing to work is "arbitrary and capricious"). Firms that contract for prison labor would be subject to liability under 42 U.S.C. § 1983 for depriving inmates of their constitutional rights, provided the "conduct allegedly causing the deprivation . . . [was] fairly attributable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982); cf. *Richardson v. McKnight*, 117 S. Ct. 2100, 2107 (1997) (concluding that "private prison guards . . . do not enjoy immunity from suit in a § 1983 case").

331. See MUSHLIN, *supra* note 229, § 9.00, at 422.

332. See Stefano Fenoaltea, *Slavery and Supervision in Comparative Perspective: A Model*, 44 J. ECON. HIST. 635, 636 (1984).

333. See *id.* ("[P]ain incentives and ordinary rewards are meaningfully different, in that the former are capable of generating greater work effort, but less carefulness, than the latter . . .").

Second, and more important, inmates do not have to work. They can choose to remain unemployed.³³⁴ If firms subject inmates to abuse or unacceptable working conditions, inmates can withhold their labor. Firms will either have to pay inmates more in order to compensate them for having to endure such conditions, or else improve the conditions.

Furthermore, a fair assessment of the risks involved in a return to the contract system cannot consider those risks in isolation. They must instead be compared to the problems that prevail under the existing regime. As noted above, prison wardens commonly observe that inmate idleness makes prisons more difficult to manage and increases the potential for disorder.³³⁵ To the extent that prison violence reflects the consequences of inmate idleness, a regime of productive prison labor can help reduce idleness and the violence it produces.

Beyond the risk of raw physical abuse, prison labor might be considered morally objectionable because inmates would be "coerced" to work for less than the minimum or prevailing wage.³³⁶ Yet before one can describe this result as coercive, one needs to identify the moral baseline that tells us how prisoners are entitled to be treated.³³⁷ If that baseline is set by the minimum or prevailing wage, then inmates who work for anything less are being coerced. On the other hand, if that baseline is set by a system of free trade, then inmates who work for whatever wage prevails in the prison-labor market are not being coerced, even if that wage is less than the wage a free worker would receive for comparable work. In any event, inmates under a contract system could not be forced to work under threat of physical coercion.

A related objection maintains that prison labor is "exploitative."³³⁸ The idea is that inmates who receive less than either the minimum or prevailing wage for their labor are being "exploited." Critics of free trade sometimes argue that trade with nations whose prevailing wage rate is well below the prevailing rate at home encourages the exploitation of foreign workers.³³⁹ Proponents commonly argue in reply that removing barriers to free trade im-

334. For example, firms that operate under the PIE program must provide "[w]ritten assurances that inmate participation is voluntary." ENHANCEMENT CERTIFICATION PROGRAM, *supra* note 251, at 2.

335. See notes 294-299 *supra* and accompanying text.

336. Cf. Cullen & Travis, *supra* note 271, at 57 (urging offenders be paid the minimum or prevailing wage).

337. See ALAN WERTHEIMER, COERCION 206-11 (1987) (discussing the distinction between moral and nonmoral baselines in the context of threats and coercion).

338. Cf. SELLIN, SLAVERY, *supra* note 27, at 146 ("The sole aim of the convict lease system was financial profit to the lessees who exploited the labor of the prisoners to the fullest . . .").

339. See Editorial, *The Fast-Track Fight*, WASH. POST, Sept. 12, 1997, at A24 ("Opponents of further trade liberalization argue that it is . . . bad for workers overseas, who are exploited by multinational corporations.").

proves the overall welfare of both trading partners,³⁴⁰ which improves the welfare of foreign workers. If this state of affairs amounts to exploitation, at least it's "mutually advantageous exploitation."³⁴¹ The same would hold true for the contract system inasmuch as it represents a form of "free trade" with the prison.

Racial stereotyping. Beyond the dangers of physical abuse, coercion, and exploitation, a contract system of prison labor threatens to reinforce invidious racial stereotypes.³⁴² America's prisons are filled with over one million of its citizens.³⁴³ The majority are African American. In 1991, African Americans constituted 13% of the general population, but nearly 50% of the state and federal prison population.³⁴⁴ Depending on how you measure, the incarceration rate of African Americans is three to seven times greater than that of whites.³⁴⁵ Moreover, the reappearance of the chain gang on the roads of some states may reinforce the stereotype of African Americans laboring under conditions of coercion.³⁴⁶ The chain gang is "one of the most deeply felt symbols and experiences of white oppression and abuse."³⁴⁷

340. See notes 277-278 *supra* and accompanying text.

341. ALAN WERTHEIMER, *EXPLOITATION* 14 (1996) (distinguishing between "harmful exploitation" and "mutually advantageous exploitation").

342. See, e.g., Beiser, *supra* note 255, at 40 ("[T]he whole notion of locking people up for profit sets off alarm bells in the minds of at least some black leaders."); *More Prisoners, More Profits: Black Males Hot Commodity for Corrections Industry*, FINAL CALL, Dec. 20, 1995, at 3, 8 (suggesting the profit motive lies behind the increasing incarceration rates for African American males).

343. See PRISONERS IN 1996, *supra* note 284, at 1.

344. See MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT* 60-61, 58-59 (1995); see also Michael Tonry *Racial Disproportion in U.S. Prisons*, 34 BRIT. J. CRIMINOLOGY 97, 97 (1994).

345. See TONRY, *supra* note 344, at 60-61. For attempts to explain this disparity, see, for example, Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 759 (1993) ("[T]he bulk of the disproportionality is a consequence of the differential involvement by blacks in most serious types of crimes . . ."), and Ronald Weitzer, *Racial Discrimination in the Criminal Justice System: Findings and Problems in the Literature*, 24 J. CRIM. JUST. 309, 316 (1995) ("[D]isparities in incarceration are due to several factors: (1) minorities' greater involvement in and arrests for violent crimes; (2) minorities' greater lack of resources to mount a quality defense in court; (3) racial bias . . . at pre-incarceration stages of the criminal justice process; and (4) the enforcement of racially discriminatory drug laws.").

346. See, e.g., Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 LAW & INEQUALITY 127, 131-35 (1997) (describing reappearance of the chain gang in Alabama); Peter T. Kilborn, *Stun Device Ratchets Up Controversy over Revival of Chain Gangs*, SAN DIEGO UNION-TRIB., Mar. 22, 1997, at A21 (describing proposal of one Maryland county to outfit prisoners with "stun belts" instead of chains and noting that Wisconsin planned to join Alabama, Arizona, Florida, and Iowa in reinstituting chain gangs); John Leland & Vern E. Smith, *Back on the Chain Gang*, NEWSWEEK, May 15, 1995, at 58 (providing inmate and noninmate perspectives on chain gangs).

347. Alex Lichtenstein, *Chain Gang Blues*, DISSENT, Fall 1996, at 7, 10; see also Tessa M. Gorman, Comment, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 469-74 (1997) (arguing that the chain gang's historical association with racial subordination should play a role in Eighth

Despite these realities, prison labor under the contract system would not reproduce the antebellum system of slavery. Slavery was premised on race. Labor under a contract system would be premised on conviction for crime, a practice expressly reserved under the Thirteenth Amendment, which prohibits "involuntary servitude, *except* as a punishment for crime whereof the party shall have been duly convicted."³⁴⁸ Furthermore, inmates working under a contract system would *choose* to work. They could not be forced to work under threat of physical punishment. In this sense, they would not be subject to "involuntary" servitude at all.

Of course, these observations leave untouched the underlying concern, which has more to do with the corrosive symbolic and expressive effects of a system in which African American men labor under the custodial supervision of white wardens. No system of prison labor can escape this objection as long as the prevailing demographics of the nation's prison population remain unchanged. Still, a contract system need not reinforce such stereotypes through the visible public display of inmates at work, as does the chain gang. All existing PIE industries, for example, appear to be situated behind prison walls away from public view.³⁴⁹

In the end, the risk that an open market for prison goods and labor will reinforce invidious stereotypes rests on the disparity between the incarceration rate of African Americans and white Americans. The problems giving rise to that disparity are deeply disturbing and need to be addressed, but denying prisoners productive labor will do nothing to address them. All it will do is perpetuate the idleness that makes life inside prison less bearable for inmates of every race.

Less eligibility. The internal life of the prison has long been governed by an external principle known as the principle of less eligibility.³⁵⁰ According

Amendment analysis of the practice's constitutionality); Tracey Meares, *Weak Link*, U. CHI. MAG., Feb. 1996, at 48 ("The historical connection between chain gangs and slavery is well-entrenched in the minds of most Americans and probably all African-Americans.") In an effort to respond to such criticisms, the governor of Alabama required that the five-man gangs "'reflect the demographics of the prison,'" with "three blacks and two whites apiece." Brent Staples, *The Chain Gang Show: Humiliating Prisoners for Political Profit*, N.Y. TIMES MAG., Sept. 17, 1995, at 62 (quoting Gov. Fob James, Jr.). Litigation in Alabama has succeeded in getting the state to agree not to chain inmates to one another as they work, but the gangs themselves will continue. See Lichtenstein, *supra*, at 7-8.

348. U.S. Const. amend. XIII (emphasis added); see also *United States v. Reynolds*, 235 U.S. 133, 149-50 (1914) (holding that although a state may sentence a convict to perform labor, a convicted criminal cannot be punished by involuntary servitude for failure to pay a surety bond to a private party); *Bailey v. Alabama*, 219 U.S. 219, 244 (1911) ("The state may impose involuntary servitude as a punishment for crime . . ."). For a historical overview of the Thirteenth Amendment, see G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment* (chs. I-VIII), 12 HOUS. L. REV. 1, 331, 357, 593, 610, 844, 871, 1070 (1974-1975), and (ch. IX), 13 HOUS. L. REV. 63 (1975).

349. Cf. SEXTON, *supra* note 254, at 5-10 (describing various PIE industries).

350. See Edward W. Sieh, *Less Eligibility: The Upper Limits of Penal Policy*, 3 CRIM. JUST.

to this principle, the life of inmates inside the prison should be worse than the life of the least well-off law-abiding citizen outside the prison.³⁵¹ The principle of less eligibility frequently supplies the normative basis for political opposition to any reform designed to improve prison conditions.³⁵²

The basic principle has two interpretations. One is deontological and holds that it is simply wrong to elevate the conditions of life inside prison above those of the worst-off outside prison.³⁵³ The second is utilitarian and holds that it is wrong to elevate conditions inside over those outside because doing so diminishes the marginal deterrent value of prison, thereby threatening to increase the crime rate as the worst-off commit crimes in order to get sent to prison.³⁵⁴ Insofar as a regime of prison labor makes the life of inmates better than that of the least well-off outside the prison, the less-eligibility principle would argue against it.

Some forms of labor would be immune to the principle of less eligibility because they make life worse, not better. Turning a crank, walking a treadmill, or engaging in similar forms of nonproductive make-work is, like the labor of Sisyphus, its own punishment. The work of prisoners under a contract system would not be punishing in this sense. Firms would have no incentive to employ inmates in nonproductive endeavors. Because inmates are generally low-skilled, the type of work available to them would probably not be high-tech, nor would it probably demand the exercise of skills that tend to make work inherently enjoyable. On the other hand, neither would it be the kind of utterly meaningless drudgery associated with crank-turning or treadmill-walking.

In general, prison labor can improve life inside the prison in two ways. First, it can provide inmates with employment and alleviate idleness. Second, it can enhance the sense of internal order within the prison. Installing the contract system would thus attract the opposition of those who subscribe to the principle of less eligibility.

Once the contract system was in place, confinement in some of the nation's prisons would no doubt offer improved life prospects for some of the nation's citizens, both in terms of employment opportunities and general

POL'Y REV. 159, 160 (1989) (stating that the principle of less eligibility "has had a tremendous influence on correctional policy").

351. As Bentham stated it:

Saving the regard due to life, health, and bodily ease, the ordinary condition of a convict doomed to a punishment which few or none but individuals of the poorest class are apt to incur, ought not to be made more eligible than that of the poorest class of subjects in a state of innocence and liberty.

Bentham, *Panopticon*, *supra* note 30, at 122-23.

352. See Sieh, *supra* note 350, at 169 (noting that "countervailing forces" will insist upon improving the condition of the poor before that of prisoners).

353. See TONRY, *supra* note 344, at 204.

354. See *id.*

sense of security. Anecdotal evidence certainly supports the claim that for many of the nation's inner-city residents life inside prison is *already* better than life outside. Jonathan Simon, for example, describes parolees who told him "with great seriousness that prison was a safer and more ordered environment than the shelters" ³⁵⁵

However, with respect to the bulk of the nation's population, Michael Tonry's observation rings more true:

Few people choose to give up their liberty and to subject themselves to the pervasive controls and limited privacy of imprisonment or intensive community corrections programs. Offsetting the "benefits" of decent medical care, reliable meals, and the knowledge that a prisoner's stay is costing taxpayers \$25,000 a year is the awareness that convicted felons bear a damaging stigma and that imprisonment is for nearly everyone a miserable experience. ³⁵⁶

Although a system of prison labor would alleviate idleness and improve conditions inside the nation's prisons, no improvement is likely to be dramatic enough to alter Tonry's conclusion. Opposition to the contract system based ostensibly on the principle of less eligibility thus actually reflects a desire to make prison life as miserable as possible, not just marginally more miserable than the life of the worst-off outside.

B. *The Politics of the Market*

Despite the benefits of returning to a contract system of prison labor, the same groups that banded together at the turn of the century to close the market to prison-made goods have every reason to try to keep it closed today. According to Ernest van den Haag, the "major problem—the absence of a voting constituency for . . . a program [of prison labor]—can be overcome only if taxpayers at large, led by those interested in the fate of prisoners, organize to overcome it." ³⁵⁷ But, realistically, those interested in the fate of prisoners are unlikely to be able to organize taxpayers to overcome the influence of interest groups opposed to prison labor. The critical question thus remains: Will the same forces that succeeded in closing the market for prison goods and labor at the turn of the century keep it closed today?

Not necessarily. Consider again the analogy between international free trade and free trade with the penitentiary. ³⁵⁸ Although opening the market for prison goods and labor can improve overall social welfare, certain groups would suffer. In order to take advantage of cheap prison labor, some firms now employing free labor might go "overseas" and set up shop behind prison bars, leaving their current labor force unemployed. Likewise, some firms

355. JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1900, at 266 (1993).

356. TONRY, *supra* note 344, at 204-05.

357. van den Haag, *supra* note 271, at 4.

358. See notes 277-284 *supra* and accompanying text.

would lose in the ensuing competition with prison industries, going out of business and harming all those whose livelihoods depended on their continued existence.

The effort of organized labor and industry to eliminate these competitive effects was the driving force behind the demise of the contract and lease systems. When the low cost of prison labor threatened to reduce the wage of free labor and to squeeze out those firms forced to compete with prison industries, groups that feared losing in the economic arena sought protection in the political arena. The laws these groups secured to restrict access to the prison-labor market and to prevent the sale of prison-made goods on the open market effectively transferred wealth from taxpayers to union members and firms against whom prison labor was competing. They thus represent a typical example of "rent-seeking" legislation.³⁵⁹

The key to opening the market for prison goods and labor is to forestall this dynamic. Three possibilities are explored below. Each depends ultimately on taxing prison industries and transferring the revenues to one group or another. The taxation of prison industries could take varying forms, such as a sales tax on prison-made goods, a corporate tax on prison industries, or an income tax on inmate wages. A tax on inmate wages, which is what the PIE program does, would seem to be the most likely option. Of course, one effect of such a tax would be to reduce the number of inmates willing to work. If inmate wages are taxed too heavily, inmates will lose any incentive to work, at which point the entire enterprise would unravel.

The first scenario envisions tax revenues being distributed to labor unions, the second to the state, and the third to victims.

1. *Three ways to open the market.*

Unions. Under the first scenario, the state would redistribute revenues generated from a tax on inmate wages to union members, and perhaps firms, who would otherwise suffer as a result of competition with prison industries.

Opening the market for prison goods and labor will lead to improved social welfare just as free trade does. Nevertheless, unions whose members lose jobs to prison labor would resist free trade with the prison. The most direct way to placate this opposition would be to offer unions compensation for the losses their members would suffer once free trade is allowed. Compensating those who stand to suffer from free trade would weaken or remove their incentive to invest in protectionist legislation. A tax on inmate wages could provide this compensation. In short, revenues from a tax on inmate wages could be used to "buy off" the unions and secure their acquiescence to free trade.

359. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.1, at 9-11, § 3.6, at 55 (4th ed. 1992).

The main problem with this scenario is that it requires politicians to recognize the social benefits to be derived from prison labor and to act in the public good by offering the necessary "bribe." Yet unless some organized interest group mobilizes in support of prison industry, politicians would have little incentive to change the status quo against the wishes of organized labor and industry. Consequently, the market for prison goods and labor would remain closed.

The next two scenarios avoid this problem. They don't rely on the public-spiritedness of politicians. They rely instead on the self-interest of other groups to counteract the self-interest of groups opposed to prison labor.

The state. Under the second scenario, the state itself would retain the revenues collected from any tax on prison industries. The state could use these revenue to offset the high costs of incarceration. Requiring prisoners to defray the cost of incarceration is an old idea,³⁶⁰ and it's beginning to enjoy renewed popularity.³⁶¹

The number of American citizens behind bars has quadrupled since 1975 and now stands at over one million.³⁶² California alone has a larger prison population than England and Germany combined.³⁶³ Despite steady construction,³⁶⁴ federal prisons at the end of 1996 were operating at 25% over their reported capacity, and state prisons at between 16 and 24% over capacity.³⁶⁵ According to one recent survey, the United States and Russia had the highest rates of incarceration among fifty-two nations, with the United States

360. See DE BEAUMONT & DE TOCQUEVILLE, *supra* note 1, at 56 ("Labor of the criminals is necessary still under another point of view: their detention, expensive for society if they remain idle, becomes less burdensome if they labor.").

361. See, e.g., Jonathan Groner, "Bringing Your Own Rope?": Judges Begin Making Convicts Pay Prison Costs, *LEGAL TIMES*, Jan. 27, 1992, at 6, 6; Richard B. Schmitt, *Debt to Society: More and More Jails Are Charging Inmates for Their Incarceration*, *WALL ST. J.*, Mar. 3, 1995, at A1; Amanda Wunder & Greg Wees, *Working Inmates Help Pay the Price of Doing Time*, *CORRECTIONS COMPENDIUM*, Sept. 1995, at 4, 4 ("More and more states are beginning to demand that inmates contribute to the costs of their incarceration.").

362. See PRISONERS IN 1996, *supra* note 284, at 1 ("The total number of prisoners under jurisdiction of Federal or State adult correctional authorities was 1,182,169 at yearend 1996.").

363. See Franklin E. Zimring & Gordon Hawkins, *The Growth of Imprisonment in California*, 34 *BRIT. J. CRIMINOLOGY* 83, 84 & fig.1 (1994). According to Zimring and Hawkins, the "two statistical trends most clearly responsible" for the increase in American prison populations during the 1980s were the "general shift toward more severe discretionary decision making" and the "[s]ubstantial increases in arrest, conviction, and imprisonment for drug offences." *Id.* at 88; cf. Thomas B. Marvell & Carlisle E. Moody, *Determinate Sentencing and Abolishing Parole: The Long-Term Impacts on Prisons and Crime*, 34 *CRIMINOLOGY* 107, 123 (1996) (concluding that recently enacted determinate sentencing laws are "unlikely to worsen prison overcrowding problems unless they are accompanied by a strong get-tough policy").

364. See, e.g., Greg Wees, *Prison Construction*, *CORRECTIONS COMPENDIUM*, Feb. 1997, at 8, 8 ("The trend in prison construction over the last several years appears to be one of increased expansion at existing facilities accompanied by a slight yet steady downturn in the number of proposed new facilities.").

365. See PRISONERS IN 1996, *supra* note 284, at 8.

imprisoning 519 per 100,000 population and Russia imprisoning 558, compared to 93 in England and Wales, 84 in France, 80 in Germany, and 30 in Japan.³⁶⁶ Three-strikes laws are politically popular,³⁶⁷ but more long-term inmates and geriatric prisons can only make things worse.

Even ignoring the human toll, the price of this incarceration rate is staggering. As of January 1996, it costs on average \$19,655 each year to keep an inmate confined, approximately \$53.85 a day.³⁶⁸ The fastest growing component of state budgets in 1994 was corrections.³⁶⁹ In 1995, the state of California, once a leader in progressive penal reforms and now a leader in the opposite direction, spent more on prisons than on higher education.³⁷⁰ All told, it cost roughly \$27.6 billion to run the nation's prisons in 1996.³⁷¹

366. See Marc Mauer, *The International Use of Incarceration*, 75 PRISON J. 113, 115 & tbl.1 (1995). But cf. James Lynch, *Crime in International Perspective*, in CRIME 11, 36-37 (James Q. Wilson & Joan Petersilia eds., 1995) (concluding that the United States "incarcerates more and for longer periods than other similar nations" for property and drug crimes, but that disparities are generally smaller with respect to violent crimes); Ken Pease, *Cross-National Imprisonment Rates: Limitations of Method and Possible Conclusions*, 34 BRIT. J. CRIMINOLOGY 116 *passim* (1994) (noting difficulties in comparing international incarceration rates).

367. Three-strikes laws have been adopted in 15 states and proposed in 22 others. See Michael G. Turner, Jody L. Sundt, Brandon K. Applegate & Francis T. Cullen, "Three Strikes and You're Out" Legislation: A National Assessment, 59 FED. PROBATION 16, 32 (1995). But cf. Henry J. Reske, *Hardly Hardball*, A.B.A. J., Dec. 1996, at 26, 26 (suggesting that three-strikes statutes provide prosecutors with leverage in plea bargaining but noting that relatively few defendants have been sentenced under three-strikes laws).

368. See CAMP & CAMP, *supra* note 246, at 69. Whether the benefits of incarceration offset its high costs, i.e., whether "prison pays," has recently been the subject of a hotly contested debate. Compare EDWIN W. ZEDLEWSKI, MAKING CONFINEMENT DECISIONS 6 (1987) (concluding that society would benefit from increased prison capacity), Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crime to Victims*, 22 LAW & SOC'Y REV. 537, 551 (1988) (suggesting that longer prison sentences are warranted for various crimes once the costs of pain, suffering, and fear endured by victims of crime is included in the calculus), John J. DiIulio, Jr. & Anne Morrison Piehl, *Does Prison Pay?: The Stormy National Debate over the Cost-Effectiveness of Imprisonment*, 9 BROOKINGS REV., Fall 1991, at 28 (concluding that the social cost of imprisoning convicted felons is less than the cost of leaving them at liberty), Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q. J. ECON. 319, 348 (1996) ("[I]ncreased reliance on incarceration [seems to be] an effective approach to reducing crime."), and Anne Morrison Piehl & John J. DiIulio, Jr., "Does Prison Pay?" Revisited, 13 BROOKINGS REV., Winter 1995, at 20, 20 (reconfirming that "prison pays for most state prisoners"), with FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 138-42, 144-47, 154 (1995) (critiquing the Cohen and Zedlewski analyses and concluding that the "major strategic problem" with "attempt[s] to express both costs and benefits of imprisonment in dollar terms" is that "many of the most significant harms associated with crime have nothing to do with economic efficiency"), and John J. Donahue III & Peter Siegelman, *Is the United States at the Optimal Rate of Crime? Allocating Resources Among Prisons, Police, and Social Programs* 5 (Mar. 6, 1996) (unpublished manuscript, on file with the *Stanford Law Review*) ("[I]t may well be possible to reduce spending on prisons, use the money to fund social programs, and reduce the overall crime rate in the process.").

369. See Michael Tonry, *Intermediate Sanctions in Sentencing Reform*, 2 U. CHI. L. SCH. ROUNDTABLE 391, 395 (1995).

370. See, e.g., Fox Butterfield, *California Prison Costs Overshadow College Funding*, L.A. DAILY NEWS, Apr. 16, 1995, at N4; see also Stephen Gottfredson, *Fighting Crime at the Expense of*

Money spent on prisons cannot be spent on other social programs. Politicians should therefore have a strong and growing interest in reducing the costs of incarceration through the introduction of the contract system and taxation of inmate wages. The money saved can be spent elsewhere. Moreover, if the public demand for prisons continues unabated, if more and more tax revenues must be devoted to building and maintaining prisons, and if alternative ways to reduce the costs of incarceration (e.g., privatization of prison management) do not succeed, prisons will consume a larger and larger share of state budgets. As a result, groups that see their share of state revenues shrink may begin to mobilize behind prison industries in order to prevent that share from shrinking any further. Pressure from these newly mobilized groups may in turn give politicians the incentive to open the market for prison goods and labor despite pressure from groups that oppose prison industries.

Victims. Under the final scenario, pressure to reopen the market would not depend on politicians paying off unions, or on groups who compete with the prison for public funds demanding a decrease in the high costs of incarceration. It would depend on victims seeking restitution.

At the turn of the century, the political struggle over prison labor had three relevant players: organized labor and industry, prisoners and reformers who identified with the interests of prisoners, and a diffuse and unorganized public.³⁷² With only these three groups on the political stage, organized labor and industry were bound to prevail. On the one hand, politicians tend to listen more to organized groups than unorganized ones. On the other hand, politicians simply do not listen to prisoners.

In contrast, today's stage includes another actor: the victim. At the turn of the century, crimes were understood as offenses against the state, which stood as the victim's surrogate in exacting punishment and retribution.³⁷³ However, since the 1970s, the victim has emerged as a powerful actor in the political arena, and the victims' rights movement has pressed its agenda with considerable success.³⁷⁴ The victim's appearance could tip the political balance of power in favor of prison industries.

Colleges, CHRON. HIGHER EDUC., Jan. 20, 1995, at B1 ("[California] state spending for corrections increased 25 percent from fiscal 1990-91 through 1993-94 (to \$3.3 billion), while funds for higher education declined by 25 percent (to \$4.4 billion)."); Bill Graves, *School Funding Suffers As State Locks Up Money for New Prisons*, PORTLAND OREGONIAN, Aug. 18, 1996, at A1 (showing a similar trend in Oregon); Jean Heller, *Amid Troubles, Prison Budget to Grow*, ST. PETERSBURG TIMES, June 4, 1995, at 1B (showing a similar but less dramatic trend in Florida); Alan Johnson, *32% Hike Sought for Prisons*, COLUMBUS DISPATCH, Feb. 15, 1995, at 1B (stating that spending for prisons in Ohio is an increasing share of the state budget, whereas spending for schools is a decreasing share).

371. See CAMP & CAMP, *supra* note 246, at 65.

372. See GILDEMEISTER, *supra* note 76, at 225-48.

373. See Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of the Issues and Problems*, 11 PEPP. L. REV. 117, 125-32 (1984).

374. See, e.g., Deborah Kelly, *Victim Participation in the Criminal Justice System*, in

One longstanding item on the victims' rights agenda is restitution.³⁷⁵ Victims' bills of rights often include a right to restitution, and federal law now requires federal courts to order restitution as part of a defendant's sentence for certain offenses.³⁷⁶ Of course, restitution has one big problem:³⁷⁷ Convicts usually lack the wherewithal necessary to make it,³⁷⁸ which tends to turn the exercise of requiring restitution into an empty gesture.³⁷⁹ A workable system of prison industry could give that gesture some real meaning. Under the PIE program, for example, \$3.6 million of the tax on inmate wages has gone to victim's programs, although most of the \$23.6 million deducted from inmates' wages has gone to the state.³⁸⁰

If the victims' rights movement organizes in support of prison labor in order to make restitution a meaningful remedy, the political calculus facing today's lawmakers will differ significantly from that which faced lawmakers at the turn of the century. Rather than confronting a politically powerless group like prisoners, or a politically unorganized group like the general public, those interests opposing prison labor would face a far more organized and formidable opponent. Where once it may have looked like prison labor

VICTIMS OF CRIME: PROBLEMS, POLICIES, AND PROGRAMS 172, 172-81 (Arthur J. Lurigio, Wesley G. Skogan & Robert C. Davis eds., 1990) (providing an overview of victims' rights movements and their successes).

375. See, e.g., Susan Hillenbrand, *Restitution and Victim Rights in the 1980s*, in VICTIMS OF CRIME, *supra* note 374, at 188, 188 ("[R]estitution . . . has been a persistent theme of the 1980s victim rights movement, if perhaps a relatively low-key one."); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 967-68 (1985) (including "full restitution" among the elements of a typical victims' rights proposal).

376. See Mandatory Victims Restitution Act of 1996, Pub. L. 104-132, 110 Stat. 1227 (codified as amended at 18 U.S.C.A. § 3663A (West Supp. 1996)); see also Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 807, 110 Stat. 1321, 1321-75 (1996) (codified at 18 U.S.C.A. § 3626 (West Supp. 1998)) (requiring compensatory damages received in prisoner litigation be credited toward outstanding restitution orders); *United States v. Ferranti*, 928 F. Supp. 206, 219 (E.D.N.Y. 1996) ("The United States is in a state of transition on restitution.").

In addition, some 23 states mandate restitution generally, 24 require it as a condition of probation or parole, and 14 require it under other circumstances, such as when a suspended sentence is imposed or the inmate participates in a work-release program. See SUSAN KISS SARNOFF, *PAYING FOR CRIME: THE POLICIES AND POSSIBILITIES OF CRIME VICTIM REIMBURSEMENT* 17-18 (1996).

377. An effective restitutionary regime faces a number of other obstacles as well. See, e.g., SARNOFF, *supra* note 376, at 20-22 (noting that many offenders are not mentally competent to work, collection methods often fail, and many offenders are unwilling to make restitution payments); LESLIE SEBBA, *THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM* 172-76 (1996) (noting that few offenders are apprehended, few apprehended offenders can afford restitution, and the proper methods for determining the amount of loss are difficult to agree upon); Alan T. Harland & Cathryn J. Rosen, *Impediments to the Recovery of Restitution by Crime Victims*, 5 VIOLENCE & VICTIMS 127 *passim* (1990).

378. According to one recent survey of the literature, "little is known about the distribution of income among offenders generally . . ." SEBBA, *supra* note 377, at 173. Nonetheless, the available evidence seems to support the general view that most inmates are relatively poor. See *id.*

379. See, e.g., Henderson, *supra* note 375, at 1011 n.329 ("At present, a person in prison has no opportunity to earn the money necessary to make restitution.").

380. See ENHANCEMENT CERTIFICATION PROGRAM, *supra* note 251, at 2.

was stealing work from free labor, today it could look like the opponents of prison labor are depriving victims of their legitimate claims to restitution.

Still, the victims' rights movement may lose steam, or its leaders may never make the connection between restitution and prison labor. Alternatively, and perhaps more likely, victims' desire for retribution may conflict with their desire for restitution. If prison industries are thought to alleviate the rigor of incarceration, victims may ultimately prefer punishment to payment.

2. *Punishment and profit.*

Although taxing prison industries and redistributing the gains may be the only realistic way to reopen the market for prison goods and labor, this strategy creates another problem insofar as it makes punishment profitable for the state.

Economic analysis views punishment as a system of deterrence and seeks to determine the optimal level of criminal sanctions and allocation of crime-fighting resources.³⁸¹ According to some economists, an optimally efficient system would include some role for nonmonetary sanctions but would rely more heavily than the current system does on fines, perhaps payable in installments or in proportion to an offender's earning capacity.³⁸² Taking this basic line of thought one step further, one might even propose making fines the system's only form of punishment. Criminal defendants unable to pay the optimal fine might be required to work and have their wages garnished until the fine was satisfied, or else remain in prison.³⁸³

In reality, the system of criminal punishment we now have differs significantly from this imagined system. From an economic perspective, the existing system is far from efficient.³⁸⁴ It relies too heavily on imprisonment,

381. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968).

382. See *id.* at 193-98 (presenting "several arguments which imply that social welfare is increased if fines are used *whenever feasible*"); see also POSNER, *supra* note 356, § 7.2, at 227 ("From an economic standpoint, the use of fines should be encouraged."); cf. Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions As a Deterrent*, 85 COLUM. L. REV. 1232, 1236-38 (1985) (describing circumstances under which the use of nonmonetary sanctions is "theoretically optimal").

383. See David Friedman, *Why Not Hang Them All, or The Virtues of Inefficient Punishment* 2 (Nov. 27, 1995) (unpublished manuscript, on file with the *Stanford Law Review*). In a similar vein, Randy Barnett has argued that we should replace our existing system of punishment with a system of restitution in which criminal offenders who were unable to make restitution "would be confined to an employment project" until they discharged their debt. Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 349, 365 & n.51 (Randy E. Barnett & John Hagel III eds., 1977); cf. J. Roger Lee & Laurin A. Wollan, Jr., *The Libertarian Prison: Principles of Laissez-Faire Incarceration*, 65 PRISON J. 108, 117 (1985) (arguing that in a "libertarian" prison the obligation to make restitution would "be fitted to the systematic provision of opportunity of inmates to earn wages").

384. Scholars have offered various explanations for this departure from efficiency. See, e.g.,

which is a comparatively inefficient and expensive mode of punishment. On closer inspection, however, this inefficiency may actually be a blessing in disguise. Why? Because a more "efficient" system of punishment—a system of punishment which relies heavily on the state extracting wealth in the form of fines from convicted criminals—creates perverse incentives for the state.

Punishment is a state monopoly. Moreover, if we regard the state as self-interested, it becomes a dangerous state monopoly. Once punishment becomes a source of profit to the state, its incentive to punish increases. Viewed in this light, the inefficiency and expense of prison turns out to be a *good* thing.³⁸⁵ Punishment *should* be expensive; otherwise, the state will have an incentive to punish too much. More people may end up in prison for longer periods of time if punishment generates a return than if it generates a loss. Any proposal that might make punishment profitable to the state, as prison labor might, should therefore be greeted with concern.³⁸⁶

Although this concern is real, it should not be exaggerated. Under a contract system of prison labor, profits from prison enterprises would go to the firms running them, not to the state. At most, the state could tax inmate wages in order to defray the costs of incarceration. For the state to recoup the costs of incarceration in full, let alone make a profit, a firm would have to pay an inmate approximately \$7.45 an hour³⁸⁷—today's minimum wage is \$5.15³⁸⁸—all of which the state would have to confiscate. Even if inmates

Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592 (1996) (arguing that imprisonment adequately expresses public condemnation of criminal acts whereas fines standing alone do not); Steven D. Levitt, *Incentive Compatibility Constraints As an Explanation for the Use of Prison Sentences Instead of Fines*, 17 INT'L REV. L. & ECON. 179, 180-81 (1997) (arguing that "incentive compatibility limits the effectiveness of fines").

385. See Friedman, *supra* note 383, at 7.

386. The risk of state expropriation is not merely speculative. Southern courts and legislatures acted to supply lessees with a steady supply of convicts while the lease system was in use. See notes 127-133 *supra* and accompanying text; see also Martha A. Myers & James L. Massey, *Race, Labor, and Punishment in Postbellum Georgia*, 38 SOC. PROBS. 267, 278 (1991) ("The general demand for black labor in the agrarian sector, as indicated by the size of the cotton harvest, stimulated the rate of black incarceration."). The most notorious example of this phenomenon was Mississippi's so-called "Pig law," which made the theft of any livestock or property valued at over \$10 into grand larceny. Thanks in part to this law, the ranks of Mississippi's prison population swelled, and "the convict lease became a tremendous enterprise." VERNON LANE WHARTON, *THE NEGRO IN MISSISSIPPI, 1865-1890*, at 239 (1947). Other southern states adopted similar measures. See STEINER & BROWN, *supra* note 131, at 21-22 (discussing North Carolina laws passed in the 1870s aimed at expanding the number of convicts eligible for contract hire). For a more recent example, consider the abuses associated with forfeiture laws that allow local law enforcement agencies to seize an offender's assets and take a cut for themselves. See LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 118-43 (1996) (describing abuses under existing forfeiture laws).

387. This figure assumes that the average annual cost of incarceration is \$15,500 per inmate, see note 243 *supra* and accompanying text, and that inmates work 40-hours a week for fifty-two weeks a year.

388. See 29 U.S.C.A. § 206(a)(1) (West Supp. 1996).

were willing to work when their wages were taxed to nothing, no competitive firm would pay that much for their labor. In short, increasing the number of prisoners or the length of their imprisonment in order to profit from their labor does not look like a very good investment for the state.

More importantly, prison industries themselves will generate powerful restraints on state overreaching. The state's incentive to abuse its power to punish is greatest when the state's profit derives from fines. Fines are a straightforward transfer payment from the criminal defendant to the state. Other than the expense of collecting them, fines cost the state nothing. Furthermore, apart from the offender's family, they have no tangible negative effect on any third party.

Profit from prison labor is markedly different. It derives from the use of low-cost labor to manufacture and sell low-cost goods on the open market. As such, prison industries do have negative third-party effects. Unlike fines, prison industries impose tangible burdens on workers and firms who must compete with them. Consequently, these groups will supply a steady and constant source of resistance to prison industries. If the state tries to expand prison industries for its own benefit or the benefit of some other group, it will continually be forced to confront this opposition, which can thus serve as a partial break on state overreaching.

CONCLUSION

The network of laws that restrict access to the market for prison labor and that prevent prison-made goods from being offered for sale on the open market was intended to protect the interests of free labor and industry. However, none of the protagonists in the struggle over prison labor openly said prisoners should not work. Indeed, prison reformers of the day continued to believe labor was critical to the success of the penitential regime. Everyone hoped that the state-use system would bring about the best of all possible worlds: The abuses of the lease and contract would end; inmates would remain busy producing goods for the state; and free laborers would keep their jobs.

In reality, the state-use system created a world in which productive, meaningful work is virtually nonexistent. The darker moments in the history of prison labor call for caution, but the basic proposition de Beaumont and de Tocqueville advanced in 1833 remains sound today: "The interest of the prisoner requires that he should never be idle; that of society demands that he should labor in the most useful way."³⁸⁹

389. DE BEAUMONT & DE TOCQUEVILLE, *supra* note 1, at 67.